Supreme Court, U.S.
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NO. 93-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

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WILLIAM O.SWAN AND
KATHLEEN R. SWAN,

Petitioners,

v.

KURT S. PETERSON, WARDEN OF WASHINGTON
CORRECTION CENTER, ET AL.,

Respondent.

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On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

I. Whether hearsay statements admitted pursuant to the Washington hearsay statute made by two 3-1/2-year-old children, who were ruled incompetent and therefore unable to testify at trial, could be found to have particularized guarantees of trustworthiness based solely on upon their consistency with prior statements, and if so, whether this would violate the anti-corroboration-bootstrapping prohibition of Idaho v. Wright, 497 U.S. 805 (1990), and the Sixth Amendment?

II. Whether the Ninth Circuit failed to follow this Court's decision in Idaho v. Wright, when it found child hearsay statements describing sexual abuse to be trustworthy based solely upon the consistency of these statements with other statements?

III. Where a child makes a concededly false accusation of abuse to a detective and prosecutor in the context of the investigation in this case, should this be considered in the calculation of whether her other hearsay statements were trustworthy?

IV. Where a finding of incompetence to testify is based on a young child's inability to speak truthfully, can a finding that her earlier statements, made when she was only 3-1/2-years old, possess particularized guarantees of trustworthiness required by Wright, supra, be sustained?

V. Whether admission of hearsay statements by two 3-1/2-year-old children, who did not testify at trial, is violative of the Confrontation Clause, where reporters of the hearsay were predisposed to find sexual abuse, where successive hearsay statements were admitted which

were made over a period of six months after the initial disclosure and where the children had been tainted by earlier interviews?

VI. Whether the Sixth Amendment Confrontation Clause is violated where a criminal defendant is convicted solely on the basis of hearsay testimony.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Petitioners Kathleen R. Swan and William O. Swan[1] request that a Writ of

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[1] The other parties to this case, not named in the caption, are Respondents Eldon Vail, Warden of Washington Correction Center for Women, and Chase Riveland, Secretary of the Department of Corrections.

Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## I. OPINIONS BELOW

The order of the District Court of the Western District of Washington, filed May 11, 1992, which approved the Report and Recommendation of the Magistrate Judge (both of which are attached hereto as Appendix A), denied petitioners' Petition for Habeas Corpus and dismissed the Petition. The opinion of the Ninth Circuit Court of Appeals, filed October 6, 1993 (attached hereto as Appendix B) affirmed the District Court's judgment. Swan v. Peterson, 6 F.3d 1373 (9th Cir. 1993). The Court of Appeals subsequently denied the Petition for Rehearing with Suggestion for Rehearing En Banc on

January 19, 1994 (attached hereto as Appendix C).[2]

## II. JURISDICTION

The Ninth Circuit's Order Denying Rehearing was filed January 19, 1994. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §§ 1257.

## III. CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This case involves the Confrontation Clause of the Sixth Amendment of the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . . to be confronted

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[2] In the direct appeal, the Court of Appeals of the State of Washington reversed petitioners' convictions in an unpublished opinion filed June 20, 1986. The Supreme Court of Washington reversed the Court of Appeals and affirmed petitioners' convictions on May 5, 1990. State v. Swan, 114 Wn.2d 613, 789 P.2d 89 (1990). A Petition for Certiorari to review the Washington Supreme Court's decision was denied on January 14, 1991. 498 U.S. 1046, 112 L.Ed.2d 772, 111 S.Ct. 752 (1991).

with the witnesses against him . . .

This case also involves the following State of Washington statute:

> RCW 9A.44.120. "Admissibility of child's statement - Conditions"
>
> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings in the courts of the state of Washington if:
>
> (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
>
> (2) The child either:
>
> (a) Testifies at the proceedings; or
>
> (b) Is unavailable as a witness: Provided, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

> A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

## IV. STATEMENT OF THE CASE

### A. SUMMARY OF HEARSAY STATEMENTS

The material evidence against the Swans consisted of hearsay statements purportedly made by their daughter, Beth Anne Swan, and her friend, Rachel Thiel, both of whom were 3-1/2 years of age when the initial allegations were made. The hearsay statements extended from October 2, 1985 until March of 1986,[3] a period of six months. The main hearsay statements can be grouped and summarized as follows:

> (a) The initial October 2, 1985 statements by Beth Anne Swan to Lisa Conradi, a day care worker

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[3] One month before trial.

who had been hired the prior day and had just met Beth Anne Swan;

(b) The October 3, 1985 statements by Rachel Thiel to Cindy Bratvold, the owner of the day care, who was permitted by the Child Protective Services (hereinafter "CPS") caseworkers to interrogate Rachel, Beth Anne Swan's best friend, in order to determine if she had also been molested;

(c) The October 4, 1985 hearsay statements by Rachel Thiel to CPS caseworker Schmidt made while sitting on Bratvold's lap;

(d) The October 4, 1985 hearsay statements by Beth Anne Swan to CPS caseworker Schmidt;

(e) The October 11, 1985 interview of Rachel Thiel by a King County detective and a prosecutor at which time Rachel made a false accusation of sexual abuse against her father, Jerry, which was the same, very extraordinary allegation she made against the Swans (putting marbles in her bottom). Rachel also falsely stated that she had previously told this to Ms. Bratvold, the day care owner.

(f) The October 17, 1985 statement by Rachel Thiel to her father, Jerry Thiel, accusing the Swans;

(g) The January 1986 statement by Rachel Thiel to Cindy Bratvold complaining her finger was burned when she removed lighted birthday candles which the Swans had placed in her anus;

(h) The March 1986 statement by Beth Anne Swan about marbles placed in her bottom to Cindy Hermansen, her foster mother with whom she was placed on October 4, 1985, when she was removed from the Swans.

B. SUMMARY OF FACTS

William Swan and Kathleen Swan, husband and wife, were both convicted of two counts of statutory rape in the first degree on April 17, 1986, and subsequently sentenced to fifty month prison sentences in the Superior Court of King County, Washington.[4]

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[4] Although the Swans have now served their prison sentences, their petition is not moot. See Carafras v. LaVallee, 391 U.S. 234, 20 L.Ed.2d 554, 88 S.Ct. 1556 (1968). They also continue to suffer substantial disabilities as a result of their convictions.

William and Kathleen Swan had never before been accused, arrested, nor charged with a crime. William Swan is an electrical engineer who met his wife in graduate school where they were both studying. Kathleen Swan is a linguist by profession who is fluent in thirteen languages. Both William and Kathleen Swan vehemently denied the allegations that they sexually abused their child, Elizabeth "Beth Anne" Swan, or her friend, Rachel Thiel. Several witnesses testified to their good relationship with their daughter and their good character.

The material evidence against the Swans consisted almost entirely of the hearsay statements of their then 3-1/2-year-old daughter Beth Anne Swan and her 3-1/2-year-old friend, Rachel Thiel,

neither of whom testified at trial.[5] The incidents allegedly occurred at some undetermined time between January and October of 1985.

Beth Anne Swan attended the Cindy Bratvold home day care from June of 1983 until October 4, 1985. Lisa Conradi was hired at the day care on October 1, 1985, at which time Bratvold gave her a rundown on the children and told her that Beth Anne Swan often had her hands in her pants and Bratvold was, therefore, concerned about the possibility of abuse.

Neither Beth Anne Swan nor Rachel Thiel were at the day care on October 1, 1985, Conradi's first day of work. It was within twenty minutes after Conradi had

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[5] The Magistrate's Report to the District Judge found that the Swans were convicted solely on the basis of the hearsay testimony: "The case against the Swans was built entirely on the hearsay statements," as opposed to the now discredited medical evidence. The Ninth Circuit agreed. Slip Op. 11318-11319.

first met Beth Anne Swan, October 2, 1985, that the first disclosures were allegedly made. At that time, Bratvold had left the day care to run errands, and Conradi saw Beth Anne Swan and noticed that she had her dress tucked into her tights. Conradi, who was extremely predisposed to find child abuse in that she had reported child abuse at other day cares where she worked,[6] instructed Beth Anne that it wasn't all right for others to see her

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[6] In a post-trial tape recorded interview with a news reporter, Ms. Conradi revealed that she had emotional problems which started with daily sexual abuse beginning when she was five years old, drug abuse and alcohol abuse, and that she hadn't realized she had been sexually abused until she entered counseling when she was 22 years old. She also explained that she sees evidence of children being abused everywhere she goes, and turned in at least 20 cases of child abuse. This interview was the basis for a motion for a new trial as newly discovered evidence, which was denied.

private parts[7] and then went on to explain to Beth Anne what was meant by the term private parts. Conradi then proceeded to question Beth Anne and claims that she obtained statements from Beth Anne to the effect that she was sexually abused by her mother and father, including descriptions of oral sex. There were no other witnesses present and Conradi took no notes of the interview, either at the time or soon afterwards. When Bratvold returned from her errands, Conradi repeated to her what Beth Anne supposedly said, and Child Protective Services ("CPS") was called.

CPS caseworkers Carol Schmidt and Ken Pattis responded and questioned Beth Anne outside of Conradi's and Bratvold's presence for 30 minutes, using leading

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[7] This was undoubtedly confusing to Beth Anne because her private parts were not showing.

questions in an attempt to obtain the information that Conradi claimed Beth Anne told her. According to caseworker Schmidt, she and Pattis "became frustrated and could not elicit anything from this child. . . ." Caseworker Schmidt then asked Conradi to help with the interview because Beth Anne would make no statements about being sexually abused. At this point Conradi asked Beth Anne if she remembered telling her that mommy spits on her or that daddy puts his penis in her mouth. The CPS caseworkers said that Beth Anne nodded, but would not make any other statements.

The caseworkers told Conradi and Bratvold that there was insufficient cause to remove the children from the day care and that another interview was necessary. Bratvold told the day care workers that Beth Anne often played with her friend, Rachel Thiel, and Bratvold told the CPS

caseworkers that she would interview Rachel the next day to determine if she had also been abused. The CPS caseworkers told her to go ahead but to not use "leading questions."

The next day Cindy Bratvold, who had no training in questioning children about abuse, questioned Rachel Thiel alone. She claims that Rachel told her that the Swans molested her. She said that she played "happy birthday games with Uncle Bill" and that they "played marbles and birthday candles" and he put "candles in her peepee and marbles in her peepee," and that she described oral sex.[8] Bratvold took no notes of the interview, either contemporaneously or thereafter, and there were no other witnesses present.

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[8] Supposedly using the word "icky" to describe ejaculate, the exact same adjective used by Beth Anne the day before.

The following day, October 4, CPS caseworkers returned to the Bratvold day care to interview Beth Anne Swan and Rachel Thiel. CPS caseworker Schmidt attempted to interview both the girls together, but had no success. The caseworker left both girls alone with Conradi and during this time Conradi sat with both girls and reminded them what they had told her and Bratvold the day before. CPS caseworker Schmidt then questioned Rachel, while she was sitting on Bratvold's lap, and Rachel supposedly repeated some of her allegations against the Swans and added new details, such as that Kathleen Swan touched her bottom, put something in her peepee, which caused there to be blood on her bottom.[9] Through the use of leading questions, Rachel

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[9] There was no medical or other corroboration for this or any other allegation by Rachel.

supposedly stated that William and Kathleen put birthday candles in her potty, put marbles in her potty, and played happy birthday games of a sexual nature.

Following this, Schmidt interviewed Beth Anne Swan. At the start of the interview she told Beth Anne that she talked to Rachel and explained "some of the things" that Rachel had told her, including the marble and happy birthday games allegations. It took fifteen minutes of coaxing before Beth Anne would answer any questions, and only then to very leading questions. Although Beth Anne had never previously mentioned "happy birthday" games nor the "marble' allegation, the caseworker asked her leading questions about them:

> [CASEWORKER SCHMIDT]: Before I asked that question [about the happy birthday games], I told her that I had talked to Rachel and that I knew about some games

> that she played and I wanted to know if she played them and she said yes.
>
> [QUESTION BY THE PROSECUTOR]: Did you ask her for descriptions of those games?
>
> [SCHMIDT]: I believe I attempted, but she would not respond. (Emphasis supplied).

Schmidt also asked Beth Anne "if her mother spits on her potty and she said yes." She then asked "where her dad puts his peepee" and Beth Anne said on her potty.[10]

The police were called, Rachel Thiel was sent home with her parents, Beth Anne Swan was removed to a foster home, child dependency and criminal proceedings were begun, and the Swans were arrested.

A crucial factor that by itself should have been sufficient to declare all

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[10] The court prohibited William Swan from testifying that Beth Anne used the term "potty" to describe the bathroom and had on occasion yelled, "Daddy is in my potty," when he was using the bathroom and she wanted to enter.

of Rachel's statements untrustworthy was the October 11, 1985 interview by Detective Marlin Bachler who was assigned to the Sexual Assault Unit of the King County Police Department and a King County Deputy Prosecuting Attorney from their Special (sexual) Assault Unit. On that date Beth Anne Swan and Rachel Thiel were interviewed at the prosecutor's office.

Consistent with what later occurred at the pre-trial hearings, Beth Anne Swan would not respond to any questions by the prosecutor or the detective regarding the allegations of sexual abuse. In stark contrast to Beth Anne Swan, Rachel Thiel readily answered questions during the interview. However, even though she was asked whether the Swans did anything to her, she never accused the Swans and when she was asked who sexually abused her, she pointed to her vaginal area and made the same, very unusual, allegation she had

previously made against the Swans, but said that "Jerry [her father's name] put marbles there" and claimed that she had told this to Cindy Bratvold.[11]

Neither the detective nor the prosecutor attempted to elicit any other information regarding this allegation and Jerry Thiel was never charged with an offense. In fact, the State called Jerry Thiel as a witness at trial where he denied that he had ever molested his daughter Rachel.[12]

The State was also allowed to introduce a statement by Rachel Thiel to her father, Jerry Thiel, made during a car

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[11] Cindy Bratvold's testimony included no suggestion that Rachel had made such a statement to her or ever mentioned "Jerry," although Rachel had accused the Swans of putting marbles in her bottom.

[12] The State of Washington conceded in its brief in the Washington Supreme Court that Rachel's statement that Jerry molested her "was incorrect" and "more likely to be wrong." Brief of Respondent at 40, n. 16.

ride on October 17, 1985 (two weeks after the initial disclosures and six days after Rachel accused her father of the same allegations she made against the Swans) where Rachel accused the Swans of putting marbles in her bottom.

Cindy Bratvold was also permitted to testify that in approximately January of 1986 (three months after the initial disclosure) Rachel told her she got a bump on her head when Bill Swan put a candle in her potty and lit it and that she burned her finger removing it[13], although on inspection Bratvold saw no evidence of a burn, nor did her father testify that he was previously aware of a burned finger.

The State called Cindy Hermansen, who was Beth Anne Swan's foster mother beginning on October 4, 1985, the day she

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[13] Which would have had to have occurred sometime prior to October 4, 1985 since she had no contact with the Swans since that date.

was removed from the Swan's house, as a rebuttal witness. Over objection she was permitted to testify that in approximately March of 1986 (one month before trial and over six months after the initial disclosure), Beth Anne told her that her mommy and daddy put marbles in her potty. When Hermansen sent her son to get marbles to show Beth Anne, and asked her whether the marbles were on her daddy's body, Beth Anne supposedly said it was actually "a snake full of marbles" while pointing to her crotch. Hermansen, who was presented in the State's rebuttal case, was the last witness the jury heard.[14]

Neither child testified before the jury. Beth Anne Swan appeared at a pre-trial hearing but would not answer any

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[14] Hermansen had previously questioned Beth Anne about the allegations and marbles. Also, Beth Anne was in therapy where the allegations were undoubtedly discussed. Slip Op. 11315.

questions and was found to be incompetent. Rachel Thiel, however, was very comfortable on the stand and answered all questions although she misstated several things and demonstrated that she could be easily led. She testified that she had been in court "40" times, although she had never been there before. When the judge asked her the color of her dress, she correctly testified that her dress was blue and white. However, the following colloquy demonstrated how easily the child's testimony could be corrupted:

> [THE COURT]: If I tell you it's a pink dress, is that a truth or a lie?
>
> * * *
>
> [RACHEL THIEL]: Well, it's blue, sort of, but it's pink.
>
> [THE COURT]: It's blue but it's pink?
>
> [RACHEL THIEL]: Yes.
>
> [THE COURT]: I don't have any more questions.

No questions were asked Rachel to determine whether she had a memory of the allegations or whether she remembered what she supposedly told Bratvold, CPS caseworker Schmidt, or her father about the abuse.

Rachel's father, Jerry Thiel, testified out of the presence of the jury at the competency-reliability hearing that Rachel made up stories and would "pretend that she went somewhere the day before when she hadn't, and you know she didn't," such as "oh, I went to the Space Needle yesterday." She also would imagine companions and make up different names for herself. He also testified that she had enjoyed coming to court to testify at the competency hearing and had a good time there.

The court therefore found that Rachel was incompetent to testify based upon "her ability to understand the obligation to

speak the truth and her ability to remember accurately and express past events. . . ." All the foregoing hearsay statements were admitted pursuant to RCW 9A.44.120, the Washington Child Hearsay Statute.

## V. HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioners raised the Sixth Amendment Confrontation Clause issue at trial, in their direct appeal, in their petition for habeas corpus and in their appeal to the Ninth Circuit Court of Appeals. Without the benefit of this Court's decision in Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), the Washington Supreme Court held that the introduction of hearsay statements did not violate the defendants' rights under the Sixth Amendment's Confrontation Clause. State v. Swan, 114 Wn.2d 613, 667-668, 647, 790 P.2d 610

(1990).[15] The District Court and the Ninth Circuit Court of Appeals likewise held that there was not a Sixth Amendment violation. Swan v. Peterson, 6 F.3d 1373 (9th Cir. 1993).[16]

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[15] When evaluating this question the Washington Supreme Court applied the wrong standard, testing the statements under a sufficient indicia of reliability standard rather than the more stringent particularized guarantees of trustworthiness test. Swan, 114 Wn.2d at 621; 648.

[16] Amicus, Professor Charles Nesson, argued in his brief that consistent with the Confrontation Clause, a criminal defendant cannot be convicted on the basis of hearsay alone, which issue the Ninth Circuit refused to address because it was not adopted in the Swans' brief. Slip Op. 11315. Insofar as this issue will be again presented in Amicus Brief in Support of Petition for Certiorari, the Swans hereby adopt such argument herein.

## VI. REASONS FOR GRANTING THE WRIT

### A. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IS IN DIRECT CONFLICT WITH THE DECISION OF THIS COURT IN IDAHO V. WRIGHT AND THE SIXTH AMENDMENT IN THAT IT PERMITTED THE INTRODUCTION OF UNTRUSTWORTHY HEARSAY STATEMENTS BASED SOLELY ON THEIR CONSISTENCY WITH OTHER STATEMENTS.

#### 1. Introduction

The Swans were convicted based upon numerous unreliable hearsay statements. Extensive hearsay statements made by Beth Anne Swan on three separate occasions stretching over a six month period of time were introduced; extensive hearsay statements made by Rachel Thiel on four separate occasions over a period of approximately four months were also introduced.[17] Unlike Wright, which

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[17] While the state court discussed in detail medical findings of abuse, the newly discovered evidence demonstrated that the prior medical findings were erroneous. The Court of Appeals found that the medical evidence of abuse was "nonexistent" as to Rachel Thiel and "equivocal" as to Beth Anne Swan. Slip

involved one short hearsay statement to a trained pediatrician, here the courts permitted hearsay statements which were far-reaching, involved and significantly less trustworthy. This Court's ruling on the admissibility of child hearsay under the Sixth Amendment Confrontation Clause in Wright mandates reversal of plaintiffs' convictions.

Hearsay statements which do not fall within a firmly rooted hearsay exception, like the statements admitted in this case, are "presumptively unreliable and inadmissible under for Confrontation Clause purposes." Wright, 497 U.S. at 818 (quoting Lee v. Illinois, 476 U.S. 530, 543, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986)). Such statements "must be excluded, at least absent a showing of particularized guarantees of

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Op. 11318-11319.

trustworthiness." Wright, 497 U.S. at 818 (quoting Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531 (1980)). After reviewing the proffered testimony, the Wright Court found "no special reason supposing that the incriminating statements were particularly trustworthy." 497 U.S. at 826.

In reaching this conclusion, the Court specifically rejected the State's argument that "evidence corroborating the truth of a hearsay statement may properly support a finding of 'particular guarantees of trustworthiness.'" 497 U.S. at 822.

> To be admissible under the Confrontation Clause, hearsay evidence must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.

497 U.S. at 822. Citing Lee, the Wright Court noted that the "true danger inherent in this type of hearsay is, in fact, its

selective reliability." 497 U.S. at 824 (quoting Lee, 476 U.S. at 545-46), (where the Court declined to rely upon the "interlocking" nature of a defendant's and codefendant's confessions). The Court thus concluded that "the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief." 497 U.S. at 819 (emphasis added).

The lower courts in this case have consistently violated the cardinal principles of Wright for essentially two reasons. First, the courts relied upon "other evidence" to support reliability -- sometimes referred to as "consistency" and other times referred to as "cross-corroboration" -- in violation of the anti-bootstrapping guidelines of Wright. Second, even more clearly than in Wright, the State did not carry its burden of

proving that the child's statements bore particularized guarantees of trustworthiness to withstand scrutiny under the Confrontation Clause.

**2. The Court of Appeals Decision is Internally Inconsistent And Conflicts With Wright Because Consistency Does Not Provide a Basis for Finding Particularized Guarantees of Trustworthiness**

In Wright, this Court utilized the excited utterance exception as an example of a traditional well rooted hearsay exception which intrinsically contained the necessary sufficient indicia of reliability. However, even with the most reliable excited utterances, once the initial excitement has subsided, subsequent hearsay statements, no matter how seemingly trustworthy, are never admissible even if they are completely consistent with the witness's earlier hearsay statements. Yet according to the Ninth Circuit's opinion in this case,

child hearsay statements stretching over a six month period were admitted solely because the later statements were "consistent" with the initial statements of the alleged victims, under the Washington child hearsay statute.[18] Slip Op. 11314-11315. This is clear error and a violation of the Sixth Amendment Confrontation Clause and Wright's requirement that there be particularized guarantees of trustworthiness inherent in the statements themselves.

The Ninth Circuit's holding that Rachel's (and also, by implication, Beth Anne's) statements during the crucially important CPS interview and subsequent interviews were reliable was based solely upon:

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[18] A non-traditional hearsay exception which is therefore presumptively unreliable. Wright, 497 U.S. at 817; State v. Ryan, 103 Wn.2d 165, 170, 691 P.2d 197 (1984).

> The consistency of the girl's statements with her earlier statements is the critical reliability factor here. We conclude that it provided a particularized guarantee of trustworthiness.

Slip Op. at 11314.

The Court of Appeals' decision is also internally inconsistent. That Court correctly criticized the courts below, including the Washington Supreme Court and District Court, for improperly relying upon the fact that the girls made consistent statements on consecutive days, in order to find reliability:

> But the [District Court] court also made the same bootstrapping mistake as did the state courts. It found relevant "[t]he allegations made by the girls were consistent, both with one another's reports and with each girl's later reports of the same activities." (Emphasis in original.)

Slip Op. 11309. Yet the Court of Appeals inexplicably succumbed to this same error in finding reliability of later hearsay

statements on the basis of mere consistency with earlier statements.

For example, the State was permitted to call Beth Anne's foster mother, Cindy Hermansen, who testified over objection in the State's rebuttal case as the last witness at trial, that while giving Beth Anne a bath in March of 1986 (over six months after the initial disclosure and one month before trial), Beth Anne supposedly told her that her mommy and daddy had hurt her by putting marbles in her potty, and when shown marbles, Beth Anne supposedly stated that they were not actual play marbles. Hermanson asked if her daddy's marbles were on his body, to which Beth Anne responded that her daddy had a snake full of marbles, while pointing at her crotch.

The impact of this testimony cannot be overstated. Since this evidence was introduced in the State's rebuttal case,

it was the last evidence heard by the jury, and was immediately followed by closing arguments. The State obviously saved this evidence to have the greatest impact upon the jury, utilizing "the 'last heard longest remembered' principle." Adkins v. Aluminum Co., 110 Wn.2d 141, 750 P.2d 1257, 756 P.2d 142 (1988).

As with the important hearsay statements to the CPS caseworker, the Court of Appeals once again held that in finding trustworthiness the "critical factor is the consistency" of these statements with her earlier statements. (Slip Op. 11315.)

Up to the point Hermanson testified, the only substantial statements from Beth Anne were her supposed disclosures to Conradi, who was vulnerable to impeachment, and 'yes-no' answers to blatantly leading questions from the CPS caseworker. The Hermanson rebuttal

testimony provided details concerning "marble games" which had never before been mentioned at trial, was the last evidence heard by the jury, and was therefore of crucial importance to the State's case.

### 3. Consistency is Not a Valid Test for Trustworthiness

There are many practical reasons why consistency cannot be a basis for trustworthiness, especially since consistency is just repetition, and "repetition is not generally a valid test for veracity." State v. Harper, 35 Wn. App. 855, 670 P.2d 296 (1983). "Consistency" is nothing more than another term for cross-corroboration, which has been specifically disallowed by Wright as impermissible "bootstrapping," 497 U.S. 822-824. To justify admissibility based on repetition would be tantamount to opening the floodgates to repetitive statements, much as occurred here. This

would never be allowed even under a firmly rooted exception, such as an excited utterance. It would be anomalous, indeed, if this could occur under a non-firmly rooted exception, without running afoul of the Sixth Amendment.

In fact, rather than demonstrating reliability, these later statements show the effect of persistent questioning which corrupts a child's memory. It is common for there to be multiple interviews of children where there are accusations of child abuse. Besides any initial statements, there will be interviews with case workers, police, physicians, and therapists, as well as questions from family members and others. Utilization of consistency as the standard by which trustworthiness can be found, as the Ninth Circuit held, will only invite the prosecution to manufacture evidence by

conducting follow-up interviews with children, much as occurred here.[19]

Consistency is in no way equivalent to trustworthiness. Quite the opposite, with very young children consistency or repetition is just as likely to be based upon a false memory, encouraged by persistent questioning. There are many reasons why consistency is not a valid test of trustworthiness.

This Court is referred to the Cornell study done by Professor Ceci, with regard to questioning of young children, cited by the Court of Appeals in its decision. Slip Op. 11314, n.9. As reported by Goleman, Studies Reveal Suggestibility of Very Young as Witnesses, N.Y. Times, June 11, 1993, at A1:

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[19] The Washington courts have allowed this type of manufactured hearsay. See State v. Henderson, 48 Wn. App. 543, 548-549, 740 P.2d 329 (1987).

> Certain techniques often used by investigators with young children increase the likelihood of false reports, the findings show. One is persistent, repeated questioning over periods of several weeks. When sexual abuse is suspected, children are typically asked the same questions by caseworkers, police investigators and lawyers, as well as parents, before they testify in court.
>
> But that repetition may lead some young children to concoct stories, according to results of a study by Dr. Ceci and colleagues reported last month at a meeting on emotional memory at the University of Chicago.

The study shows that repeated questioning of very young children created false memories based upon the questioning. Importantly, "the accounts of those false memories are often quite believable." Id. at A9. The study also found that the children are not being intentionally misleading, "but are simply very poor at recalling and explaining what happened." Id. With regard to sexual abuse cases, the study concludes:

> The very stressfulness of an event like sexual abuse can make children give false reports. "If the original situation was very stressful, it can narrow a child's perception so that later memories won't be as accurate," said Dr. Douglas Peters, a psychologist at the University of North Dakota, whose research shows that distressing situations increase the mistakes children make in recounting them.
>
> Earlier studies of young children's suggestibility led to the conclusion that they could be swayed only about minor details, not the main facts of what had happened to them. But his review of the recent data has led Dr. Ceci to a different conclusion.

Id.

> Dr. Ceci therefore recommends that:
>
> Interviewers ought to safeguard against this by testing at least one alternative plausible hypothesis about what happened. If they fail to do this, they're in danger of confirming their own bias by unduly influencing and distorting the child's memory.

Id.[20]

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[20] This did not occur here.

Neither the trial court, the Washington Supreme Court, the District Court, nor the Court of Appeals has ever made the necessary findings that these many hearsay statements possessed particularized guarantees of trustworthiness as required by Idaho v. Wright. The Ninth Circuit's reliance on consistency directly conflicts with Wright's prohibition on cross-corroboration bootstrapping. There was nothing to overcome the presumption of unreliability nor the requirement of particularized guarantees of trustworthiness required by the Confrontation Clause.

B. FALSE STATEMENTS BY RACHEL TO POLICE INVESTIGATING THIS CASE ALLEGING ABUSE BY HER FATHER DEFEAT ANY FINDING OF TRUSTWORTHINESS

1. The Court of Appeals Erroneously Held that Non-Corroborating Evidence Regarding Rachel Thiel's False Statements Was Irrelevant to Demonstrate the Trustworthiness of Her Hearsay Statements.

In Wright, supra, this Court forbid the use at trial of other corroborating evidence to show that a child's hearsay statement was reliable. The prohibition against the use of corroborating evidence in Wright was for the protection of the defendant. Here, clear evidence was presented that Rachel could not speak the truth, including her telling her dad that she had gone places where she hadn't, such as going to the Space Needle; her false testimony during the competency hearing that she had previously been in court 40 times when she had never been there before; her being easily swayed by the

judge to agree that she was wearing a blue and pink dress at the competency hearing when she had previously correctly identified its color; and her false allegations of sexual abuse against her father, which the State has conceded "was incorrect."

This evidence demonstrated the unreliability and lack of trustworthiness of all of Rachel's statements. To hold, as did the Court of Appeals below (Slip Op. 11311), that evidence which demonstrates most clearly that the complaining witness was untrustworthy in her accusations of sexual abuse could not be utilized in judging the trustworthiness of her other statements made a few days previously in the course of the same investigation, is a denial of a defendant's Fifth and Fourteenth Amendment due process rights as well as Sixth Amendment rights.

Otherwise, statements that may seem reliable on their face, but are shown to be untrue on the basis of information gained afterwards, would be wrongly admitted. An example would be an otherwise seemingly reliable statement made by a person who was later discovered was delusional at the time. Another example would be a seemingly trustworthy account by a child reporting sexual abuse, but where it was later learned that the abuse could never have happened because the child was never in the city where the abuse supposedly occurred. Should information be deemed irrelevant in the equation of reliability merely because it was acquired after the hearsay statement, an unreliable statement might pass constitutional scrutiny as being particularly worthy of belief, when in fact it is false.

The Court of Appeals' suggestion (Slip Op., p. 11311, n. 7) that Rachel Thiel's statement regarding her father putting marbles in her bottom may have referred to entirely different events than those involving the Swans is simply erroneous. First, the State conceded that Rachel was incorrect. Second, Rachel was repeatedly being asked by a detective whether the Swans hurt her when she volunteered this very same peculiar sexual assault claim of marbles in her bottom against her father while pointing to her genitals. Third, the State obviously believed that this was a false accusation against her father, because they called him as a very important hearsay witness to repeat statements that Rachel made against the Swans and also to deny he ever abused her. Finally, Rachel claimed that she told this to "Cindy," her day care worker, who was the person who first heard her

allegations against the Swans. Cindy Bratvold did not support Rachel on this.

**2. Where a Child's Incompetence is Based on Her Inability to Tell the Truth, Her Hearsay Statements Must be Found to be Untrustworthy.**

Counsel for the Swans could not find a case where the ground for a child's (Rachel's) incompetency was, as here, based on a trial judge's finding of her inability to tell the truth, and where her hearsay statements were nevertheless found to be particularly worthy of belief. Compare, State v. Paster, 524 A.2d 587 (R.I. 1987) (a young child found to be incompetent at trial based upon her inability to tell the truth because of her young age, must be presumed to be likewise incompetent at the time she made her earlier hearsay statements). Unlike the situation presented in Wright, where a child's incompetence was based solely on her inability to communicate with the jury

(497 U.S. 824-825), here Rachel was an able communicator in court. According to her father, Jerry, who watched her testify at the competency hearing, Rachel was a good communicator, had a good memory and enjoyed coming to court. The record is clear that she was talkative and communicative, although she had serious problems telling the truth. In Wright, this Court explained:

> the Confrontation Clause does not erect a per se rule barring the admission of prior statements of a declarant who is unable to communicate to the jury at the time of trial . . . . <u>although such inability might be relevant to whether the earlier statement possessed particularized guarantees of trustworthiness</u>, a per se rule of exclusion would not only frustrate the truth-seeking purpose of the Confrontation Clause, but would also states in their "enlightened development in the law of evidence" . . . (Emphasis supplied, citations omitted.)

497 U.S. 825.

Here we have the exact situation contemplated in the foregoing passage, where a child's incompetency is based on her inability to tell the truth, and where this is directly relevant to the reliability of her earlier statements. However, in spite of Wright's directives, the Court of Appeals erred in holding that Rachel's incompetence was irrelevant to the trustworthiness determination.

The Court of Appeals erroneously stated that the trial court distinguished Rachel's competency between her ability to testify in a courtroom setting, as opposed to her ability to tell the truth at the time of the declarations. Slip Op. 11312. The record does not support this. The trial judge's findings about her incompetency related solely to her inability to tell the truth, not her ability to communicate, which she did well. It would be anomalous, indeed, if

Rachel, who could not testify accurately or truthfully at the competency hearing could possibly be found to have been reliable seven months earlier when she was only 3-1/2 years old. See State v. Paster, supra.

### C. THE HEARSAY STATEMENTS DID NOT POSSESS PARTICULARIZED GUARANTEES OF TRUSTWORTHINESS AND WERE ADMITTED IN VIOLATION OF THE CONFRONTATION CLAUSE.

The initial statement by Beth Anne to Conradi contained few details and did not mention the important and subsequently recurring allegation of marbles being placed up her bottom, which was only extracted from her in a secondary interview by use of very leading questions, after Rachel Thiel first made this allegation. As the Court of Appeals recognized, Conradi's credibility was assailable given her prior involvement and fixation with sexual abuse cases. Slip Op. 11317-11318. Rachel Thiel's initial

statements to Cindy Bratvold, the owner of a home day care, were also of questionable weight given the fact that Bratvold, an untrained interrogator, went into the interview predisposed to having Rachel confirm the abuse because she knew the details of what Beth Anne had supposedly told Conradi the prior day, and told CPS that she would attempt to confirm if Rachel Thiel had been likewise abused by the Swans.[21]

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[21] There can be no suggestion that Bratvold's interrogation techniques were appropriate. Bratvold had never interviewed a child before for sexual abuse, she had no formal training, she took no notes during the interview, she was emotional during the interview which undercuts any objectivity, and the only instruction given her by the CPS worker who permitted her to do this, was to "not use leading questions." It is doubtful that Bratvold even knew what was meant by the term leading question. It is also questionable and suspicious that absent the use of suggestive questions by predisposed adults who knew what was said by each child, both Beth Anne and Rachel Thiel would have used the same adjective, "icky," in describing ejaculate.

Interviews of Rachel and Beth Anne by a CPS caseworker two days after Beth Anne's initial disclosure were even more critical to the State's case than the initial interviews by Bratvold and Conradi. Unlike the earlier interviews which were done by untrained day care workers who were impeachable, here the interview was conducted by a trained Child Protective Services caseworker.[22] Rachel Thiel provided significant additional details during the CPS interview, while sitting on Bratvold's lap, claiming that the Swans put birthday candles in her potty, put marbles in her potty, played sexual "happy birthday games" with her, and that there was blood on her bottom during these games.

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[22] The State argued in its closing that the caseworker was a professional without bias or interest in the outcome, which contrasts with Conradi and Bratvold.

Through the use of blatantly leading questions, the caseworker was able to obtain statements from Beth Anne consistent with Rachel's statements, to the effect that her parents played happy birthday and marble games with her, that her mother spits on her potty, and that her daddy puts his peepee on her potty. Important details never previously disclosed, such as Beth Anne's marble allegation, were produced through leading questions, with Beth Anne merely responding "yes," at this interview. These statements were of crucial importance to the State's case.

In finding these statements reliable, the Ninth Circuit accepted the findings of the state trial court, including the fact that more than one person heard the statements, they were spontaneous, and the girls did not have a tendency or motive to lie.

The trial court's finding to the effect that more than one person was present when the statements were made, is not in any way indicative of the statement being trustworthy, but only goes to the credibility of the reporting witness.[23] Also, the statements by Beth Anne and Rachel, to Conradi and Bratvold respectively, were made to only one person and were nevertheless found to be reliable.

The finding that some responses of the girls were spontaneous is also clearly erroneous since the CPS interviews were formal interviews wherein the CPS worker asked many leading questions, which the Court of Appeals found to be troublesome.

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[23] The petitioners argued below that the lack of credibility of the reporting witness was a factor in determining trustworthiness. The Ninth Circuit erroneously found this to be irrelevant with respect to the Confrontation Clause. Slip Op. 11312-3.

See: Slip Op. 11314. Moreover, as occurred here, if there is "evidence of prior interrogation, prompting or manipulation by adults, spontaneity may be an inaccurate indicator of trustworthiness." Wright, 497 U.S. at 826-827 (quoting State v. Robinson, 735 P.2d 801, 811 (Ariz. 1987)). The prior interrogations as well as Conradi's questioning Beth Anne and Rachel immediately prior to this interview "about what Beth Anne had told [her]" two days before was tantamount to coaching. See Goleman, supra.

Finally, the finding by the trial court that neither girl had a motive to lie and had a relationship of trust with the adults is also erroneous and irrelevant. First, it has been shown that Rachel Thiel was either unable or unwilling to testify truthfully during the competency hearing, in her imaginary

statements at home as reported by her father, and in the false marble allegation against her father. Neither girl had any relationship of trust with the CPS caseworker nor with Conradi, who had started her job at the day care the day that the first disclosures were allegedly made. While both children knew Cindy Bratvold from going to the day care, this is not necessarily a relationship of trust, and even if it were, does not in any way signify that Rachel's statements to her were trustworthy, especially when viewed in relationship to the untrue statements made by Rachel Thiel to her father, the court, and the police detective.[24]

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[24] Even assuming, arguendo, that the first statements made by the first child to Conradi had sufficient guarantees of trustworthiness, the subsequent statements by Rachel Thiel must fail under the Idaho v. Wright test given Bratvold's obvious predisposition, knowledge, and motivation to obtain similar statements.

The Court of Appeals noted that most significant to the District Court were statements by the girls showing a specific description or oral intercourse. In questioning by Conradi, Beth Anne Swan supposedly described icky milk coming out of her father's penis. Conradi told Bratvold this description, and the next day Bratvold claims that Rachel used the same description. The Court of Appeals found this to satisfy the reliability requirement.

This finding is also not sustainable. It is very suspicious that both children could have independently come up with the same adjective to describe ejaculate, unless adults, who were aware of prior

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Furthermore, unlike the reporter of the hearsay in Wright who was "a pediatrician with extensive experience in child abuse cases," 111 L.Ed.2d at 648, here Bratvold was untrained, predisposed and obviously biased because of her personal involvement as owner of the daycare where child abuse was first disclosed.

questioning, used leading questions suggesting such an answer. And, even if there were sufficient indicia of reliability with regard to these first statements, which petitioners challenge, this reliability would not carry over to later statements made by the girls. The contrary is true. Wright, id.

In finding that the children's secondary statements to the CPS caseworker, Rachel's father, Bratvold and the foster mother had sufficient indicia of reliability, the Ninth Circuit relied solely upon "cross-corroboration," -- that is, finding that both children told similar stories.[25] This ruling runs afoul

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[25] While an examination of their actual statements shows that their stories differed substantially, nevertheless, even if there was some similarity between their alleged hearsay statements, this was easily explained by the fact that Conradi reported to Bratvold what Beth Anne Swan supposedly said. Bratvold then conducted an examination of the second child with the object of obtaining similar

of this Court's holding in Wright which rejects cross-corroboration as a proper test of reliability. See 497 U.S. at 824. This is especially the situation here since Bratvold, the second reporter of the allegation of child abuse, and also the caseworker, had been informed by Conradi of the details of the allegations and especially Beth Anne's description of oral sex. Furthermore, these children were close friends and not only were together prior to the reporting, but were placed together with Conradi where she discussed their statements just prior to the very important interviews by the CPS caseworker.

Furthermore, hearsay statements were erroneously found to be reliable even though they were made by Rachel Thiel to

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disclosures. The CPS caseworker utilized leading questions to have the children repeat earlier statements.

her father approximately two weeks after the initial disclosure. By this time she had been interviewed by the owner of the day care, by a CPS worker, by a physician taking a medical history while conducting a medical examination, and by the police. The same is even more true of the statements made by Rachel to Bratvold in January of 1986 concerning birthday candles in her anus, and Beth Anne's statements to her foster mother in March of 1986.

Moreover, although briefed in the Court of Appeals and exhausted below, neither that court nor any other reviewing court ever conducted an analysis of hearsay statements by Rachel Thiel to Bratvold in January of 1986 (four months after the initial disclosure) wherein Rachel told Bratvold that at some prior undetermined time Bill Swan bumped her head when he put a candle in her potty and

lit it and she burned her finger when she pulled it out. There was nothing about this rather dramatic disclosure that made it particularly worthy of belief, especially since no one ever saw any burns or evidence of physical abuse. This disclosure was substantially different from her prior disclosures and therefore could not be deemed to be consistent. However, it added substantial details to the State's case, bolstered Rachel Thiel's credibility and cannot be found to be harmless.[26]

**VII. CONCLUSION**

The Court of Appeals statement that while children pretend, "this does not reveal a tendency to prevaricate" (Slip Op. 11311), is not sustainable. Whether

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[26] The Ninth Circuit did not undertake a harmless error analysis of the effect of any of the hearsay statements. Brecht v. Abrahamson, 507 U.S. ___, 123 L.Ed.2d 353, 113 S.Ct. 1710 (1993).

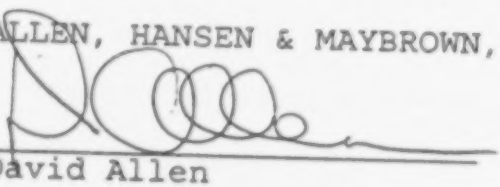
the children were pretending about the Swans, prevaricating, or merely suggestible because of leading and ongoing questioning (Goleman, supra), are merely distinctions without differences. Regardless, their hearsay statements did not possess particularized guarantees of trustworthiness and hence violated the Sixth Amendment.

For the foregoing reasons, this Court should grant the writ of certiorari.

DATED this 14th day of April, 1994.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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|---|---|---|
| WILLIAM O. SWAN, and KATHLEEN R. SWAN, | ) | |
| Petitioners, | ) | |
| v. | ) | CASE NO. C90-965M<br>C90-966M |
| KURT PETERSON, et al., | ) | ORDER |
| Respondents. | ) | |

The Court, having considered the petition for writ of habeas corpus, respondents' motion for summary judgment, the memoranda of the parties, the Report and Recommendation of the Hon. Philip K. Sweigert, U.S. Magistrate Judge, and the balance of the record and files herein, does hereby find and ORDER:

(1) Said Report and Recommendation is approved and adopted;

(2) Respondent's motion for summary judgment is GRANTED, and the petition is denied; and,

(3) The Clerk is to direct copies of this Order to counsel of record and to Judge Sweigert.

Dated this 11th day of May, 1992.

Honorable Walter T. McGovern
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

Swans,

Petitioners,

**JUDGMENT IN A CIVIL CASE**

V.

Peterson,

Respondent.

CASE NUMBER: C90-965M
C90-966M

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that petition by Swans is denied and respondents' motion for summary judgment is granted.

5/11/92
Date

B R U C E  R I F K I N
Clerk

(By) Deputy Clerk Wendy Samson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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| WILLIAM O. SWAN, and KATHLEEN R. SWAN, | ) | |
| Petitioners, | ) | CASE NO. C90-965M C90-966M |
| v. | ) | |
| KURT PETERSON, et al., | ) | REPORT AND RECOMMENDATION |
| Respondents. | ) | |

INTRODUCTION AND SUMMARY CONCLUSION

Petitioners William O. and Kathleen R. Swan are in state custody pursuant to their 1987 convictions of first degree statutory rape of their three and one-half year old daughter, Beth Ann, and her friend Rachel. They have filed this petition for habeas corpus under 28 U.S.C. §2254 to challenge those convictions. Respondents have moved for summary judgment, contending that there are no issues of material fact, and that they are entitled to judgment as a matter of law. Petitioners have opposed the motion, and have

requested an evidentiary hearing. After careful consideration of the entire record and the memoranda of the parties, and after hearing oral argument on the motion, I conclude that an evidentiary hearing is not necessary, and that respondents' motion should be granted.

## DISCUSSION

The facts of this case, as found by the Washington Supreme Court, are as follows:

> On October 2, 1985, 3-year-old B.A. walked out of a day-care center bathroom with her dress tucked in her tights. The center's teacher, Lisa Conradi, untucked the dress and told B.A. to keep her private parts covered. When B.A. appeared to be confused, Conradi explained that "private parts" means the areas covered by her bathing suit. B.A. pointed to her chest and crotch area. Conradi then added that no one should look at or touch B.A.'s private parts, whereupon B.A. said, "uh-huh, Mommy and Daddy do." When asked "What do Mommy and Daddy do?", B.A. replied , "Mommy spits on me." Conradi asked where, and B.A. pointed to her crotch. At this point, Conradi gave B.A. a book and took the rest of the children downstairs. When Conradi returned, she asked B.A. if her parents did anything else to her private parts. B.A. said she spits on Mommy in her private parts and that Daddy "puts his potty in me and it hurts real bad." Conradi explained that a man's potty was a penis. The two then walked around the room. B.A. played

peekaboo from behind a door with Conradi several times and said, "My Daddy puts his penis in my mouth and icky milk comes out." When asked who else played this game, B.A. said Josh does. B.A. also said they played the games in the bedroom with their clothes off.

When Cindy Bratvold, the day-care owner, returned to the center a short while later, Conradi told her about B.A.'s statements. Bratvold then called Child Protective Services (CPS). After calling CPS, Bratvold asked B.A. whether her close friend R.T., who attended the same day-care center, played games with B.A.'s parents. B.A. said "yes."

Two CPS caseworkers interviewed B.A. that day. B.A. would not answer questions they posed, but when Conradi asked in their presence if her mother spit on her or put her mouth on B.A.'s private parts, the child nodded and said "yes." The interview ended when the defendant Kathleen Swan came to take her daughter B.A. home. The CPS caseworkers then decided to interview R.T. and B.A. on October 4, when both girls were scheduled to be at the day-care center.

R.T. came to the center the following day, October 3, but B.A. did not. Bratvold took R.T. upstairs and began to talk to her. Bratvold started by asking R.T. is she liked certain people, including "B.A.'s Mommy." R.T. liked the people listed and "kind of" liked Kathy Swan. When asked what she meant, R.T. said "she makes us play funny games." These games included exercise games and ring around the rosy in the nude and falling on the bed. "Then we kiss Kathy's boobies and we lick her potty, and she does that to us, too." R.T. also said that "Kathy puts - one time Kathy put something in my potty

and made me bleed, and she cleaned it up and told me not to say anything."

R.T. then said she played games with "Uncle Bill" (the defendant William Swan.) She said that Uncle Bill's favorite game was the happy birthday game. "And that's where he puts his peepee in my mouth and shakes it around, and then he says, 'Here is your birthday present,' and something icky gets in my mouth." R.T. also said that the Swans put candles and marbles in her "peepee." She added that another man, John or Josh, played the games.

The next day, CPS caseworkers came to the Bratvold day-care center to talk to the two girls. An initial attempt to interview them together proved unsuccessful, so the caseworker talked to the girls separately in Bratvold's presence. R.T. told the caseworker that she played "with a game of marbles" at the Swans' home. She then added, "Bill plays without his clothes on. Bill touches my potty with his fingers." When asked what a "potty" was, R.T. said it was a "peepee hole." R.T. then said, "Kathy put some marbles in my bottom." When asked where her bottom was she said "peepee hole" and pointed to the vaginal area of an anatomically correct doll that the caseworker brought. R.T. then added, "I am afraid . . . Kathy touches my potty. Blood was on my bottom. Kathy put something in my peepee hole. It hurt." She said there was blood "down there" and pointed to her crotch. She also said that she touched Kathy's "potty and boobies" and put her mouth on them. R.T. then said that B.A. was present, and added, "I am too afraid for it. I just hurt, she poked a marble in it, she just put a marble in it, in my potty." What happened? "Kathy fixed it."

Bratvold then asked R.T. about the happy birthday games. R.T. said, "Bill and Kathy put a candle in my potty and played happy birthday. Bill put marbles in my potty to make it better. Stuff comes out of his peepee." When asked if the "stuff" was like milk, water, or blood, R.T. replied, "Like milk." She added that "Bill gives me a happy birthday present, gives me one in my bottom." When asked if she liked Bill, R.T. said, "He is mean, I don't like him, he hurts me, he puts his peepee - ." R.T. pointed to the vagina on the doll when asked where Bill puts his peepee on her. "It hurt." R.T. added that B.A. played the marble and happy birthday games with the defendants.

The CPS caseworker then interviewed B.A. When asked if Mommy spits on her potty, B.A. replied "Yes." When asked where Daddy puts his peepee, she said, "On my potty." When asked how it felt, she answered, "It hurts." B.A. said R.T. was present when these things happened, and she said that she played happy birthday and marble games with her mother and father, but she would not describe the games.

After the interviews, the police were called and the children were taken into protective custody. B.A. was placed in a foster home while R.T. was returned to her parents and continued to attend Bratvold's day-care center. Two months later, R.T. told Bratvold she wanted to tell her something. "See my finger? I have a burn. I had a burn . . . . When Bill and Kathy lit the candle in my potty and I tried to grab it out, my finger got burned, and then I bumped my head on the counter when they made me lay on the counter." On October 17, 1985, after the alleged abuse came to light, R.T. spontaneously told her

> father that "Bill and Kathy are bad" because they put marbles in her bottom.
>
> B.A.'s foster mother testified that while drying B.A. off after a bath, B.A. told her that her Mommy and Daddy put marbles in her potty. The foster mother asked her son for some toy marbles and asked B.A. if they were the type of marbles Daddy put in her potty. B.A. laughed and said no. When asked what kind of marbles Daddy used, B.A. pointed to her crotch. The foster mother then asked if the marbles were on Daddy's potty, and B.A. pointed to her crotch and said, "Yes, and a snake full of marbles." The foster mother also testified that B.A. had mentioned marbles on other occasions, and once had said that her Daddy put marbles and other things inside her potty and then started to cry as she said this. The foster mother testified further that B.A. once brought up the subject of birthday candles in her potty.

State v. Swan, 114 Wn.2d 613, 624-628 (1990).

The original petition in this case contained two claims. Following the filing of respondents' initial summary judgment motion, the petition was amended to add two additional claims, and the petition was stayed pending exhaustion of the two new claims in the state courts. That process has now been completed, and respondents have renewed their motion for summary judgment.

The four claims presented in the petition are as follows:

(1) admission of hearsay statements of the two alleged child victims violated petitioners' Sixth Amendment right to confrontation;

(2) failure of the State to disclose that Ms. Conradi was herself a victim of child abuse violated petitioners' Fifth and Fourteenth Amendment rights;

(3) presentation by the State of physical evidence of abuse, now shown to be false by newly discovered evidence, violated petitioners' Fifth and Fourteenth Amendment rights to a fair trial; and,

(4) petitioners were denied effective assistance of counsel by counsel's failure to discover prior to trial that the physical evidence of sexual abuse was false.

These claims will be addressed separately.

(1) Admission of Hearsay Statements.

Petitioners contend that the admission of statements made by the two children to Lisa

Conradi, to Cindy Bratvold, to CPS caseworker Carol Schmidt, to Gerald Thiel (Rachel's father), and to Beth Ann's foster mother violated their Sixth Amendment right of confrontation. Petitioner argues that the §2254 presumption of correctness does not apply to the state court's finding of reliability in the hearsay statements, and that, as a consequence, an evidentiary hearing is required. Petitioner is correct that the presumption of correctness does not apply to the reliability findings; the determination of the constitutionality of admission of the hearsay statements is a mixed question of fact and law. However, an evidentiary hearing is not appropriate on this claim. This Court's determination of the constitutionality of admission of the hearsay statements is based on independent review of the trial transcripts, not on new evidence from a hearing.

The initial disclosure of abuse was made by Beth Ann to Lisa Conradi on Wednesday, October 2, 1985. According to Lisa Conradi,

she asked Beth Ann only open-ended questions at this time. That same day, Beth Ann was interviewed by two CPS caseworkers in Lisa's presence. When Beth Ann would not respond to their questions, Ms. Conradi asked her a leading question, to which the CPS worker noted an affirmative response, but Ms. Conradi did not. Ct. Rec. 35, Exhib. 3, p. 556; Exhib. 5, p. 96.

Before the CPS caseworkers arrived on October 2, Cindy Bratvold asked Beth Ann if anyone else played games with her parents. Beth Ann responded that her friend Rachel did, and also someone named John or Josh. Ct. Rec. 35, Exhib. 5, p. 53. Ms. Bratvold testified that she asked this question of Beth Ann because she had noted that Beth Ann and Rachel had several times used a highly unusual greeting, in which they both held their crotches and giggled. Ct. Rec. 35, Exhib. 5, pp. 53-54, 82.

The following day, October 3, Rachel was present at the day care and Beth Ann was not. After a caution from the CPS caseworker, Carol

Schmidt, against the use of leading questions, Ms. Bratvold interviewed Rachel. Ct. Rec. 35, Exhib. 5, pp. 54-55. She began with open questions about the Swans. When asked about games, Rachel described activities very similar to what Beth Ann had disclosed the previous day, namely, "games" played in the nude involving genital touching and oral intercourse. Ct. Rec. 35, Exhib. 5, pp. 54-56, 151-154.

The statements of the two girls to Lisa Conradi and to Cindy Bratvold were admitted at trial through the testimony of Ms. Conradi and Ms. Bratvold because the two girls were found incompetent to testify. Hearsay statements to other adults were also admitted, although none were as detailed or extensive as the statements to the two day care workers. As physical or other corroborating evidence of abuse was equivocal or absent, the State's case against the Swans was built entirely on the hearsay statements.

Criminal defendants indisputably have a Sixth Amendment right to confront witnesses

against them. This right is one basis of the long-established hearsay rule, although the two are not strictly equivalent. California v. Green, 399 U.S. 149, 155-156 (1970). A literal reading of the Confrontation Clause would bar all hearsay evidence, a result "long rejected as unintended and too extreme." Ohio v. Roberts, 448 U.S. 56, 63 (1980). Instead, the Supreme Court has developed a test which harmonizes a defendant's Sixth Amendment rights with society's interest in accurate fact-finding, which may require a court's consideration of out-of-court statements. Under this test, the Confrontation Clause prohibits the use of hearsay evidence unless the State makes a sufficient showing that (1) the declarant whose statement it wishes to offer is unavailable, and (2) the proffered hearsay bears adequate "indicia of reliability." Ohio v. Roberts, 448 U.S. at 65-66.

There is no dispute here as to the unavailability of the two children; the trial court held a competency hearing and found both

girls incompetent to testify. Ct. Rec. 35, Exhib. 1, pp. 217-218. The focus here, then, is on whether the statements bore sufficient indicia of reliability to withstand scrutiny under the Confrontation Clause. Idaho v. Wright, 110 S.Ct. 3139, 3147 (1990). Since out-of-court statements are presumed to be unreliable, the burden is on the State to show otherwise. Id.

The Supreme Court in Wright, a leading case on admission of hearsay statements in child sexual abuse cases, stated that there are no set requirements, procedural or otherwise, for showing reliability. Instead, "the particularized guarantees of trustworthiness required for admission under the Confrontation Clause must likewise be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief." Wright, 110 S.Ct. at 3148-3149. The statement must be so trustworthy that adversarial testing would add little to its reliability. Id.

It is important to note that the focus here is solely on the declarant and the factors making the declarant worthy of belief, rather than on the credibility of the witness reporting the hearsay statements. Petitioners have indirectly challenged the credibility of Lisa Conradi in a separate claim. For the purposes of this Confrontation Clause claim, however, the credibility of the reporting witnesses is not an issue. The witnesses were subjected to thorough cross-examination, and it was up to the jury to weigh their credibility.

The trial court held a voir dire examination of each of the reporting witnesses before admitting the hearsay testimony. From the transcripts of these hearings, it is apparent that there were ample indicia of reliability in the initial statements of the girls.

As to the disclosure by Beth Ann to Ms. Conradi, which precipitated this case, these initial statements were totally spontaneous and without any motive to fabricate. The

initial disclosures by Rachel to Ms. Bratvold were also completely spontaneous and also without any motive to fabricate. Rachel's statements were in response to open-ended, not leading questions. There was no sign of collaboration between the two girls; at this point, they were being interviewed separately by two different people and had not even seen one another between the two interviews. The allegations made by the girls were consistent, both with one another's reports and with each girl's later reports of the same activities. Cindy Bratvold, who had known both girls for some time through her day care business, stated that neither of them was prone to lying or story-telling. Ct. Rec. 35, Exhib. 5, pp. 44-45. Finally, and most significantly, there was in this first disclosure of each of the girls a spontaneous description of oral intercourse which was so specific, and showed such inappropriate and precocious knowledge, that it would be difficult to see this knowledge as anything other than the result of personal experience. These factors, arising

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from the circumstances surrounding the making of the statements, provide a more than adequate basis for rebutting the presumption that these hearsay statements were not worthy of reliance at trial. Wright, 110 S.Ct. at 3150.

As to the remaining hearsay statements admitted at trial, the following analysis applies:

(1) Statements to CPS Caseworker Carol Schmidt. Carol Schmidt interviewed Beth Ann on October 2, but was unable to get any statements from her about the alleged abuse.[1] According to Ms. Schmidt, Beth Ann did nod affirmatively to one leading question. Ms. Conradi, who was also present, did not see the response. This "nod" cannot be considered hearsay, as it was not admitted for the truth of the matter asserted, but rather as part of

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[1]Beth Ann was extremely reluctant to say after the initial disclosure to Lisa Conradi on worth noting that Cindy Bratvold testified th generally somewhat fearful of talking, and that sh and father told her not to say anything about the because God would not forgive her. Ct. Rec. 35,

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the total picture of the events following Beth Ann's initial disclosure.

On October 4, Carol Schmidt interviewed both Beth Ann and Rachel, with the assistance of Cindy Bratvold. Ms. Schmidt, a trained CPS caseworker, testified that Rachel gave spontaneous answers to open-ended questions, repeating what she had said the previous day. Ct. Rec. 35, Exhib. 3, pp. 563-564. The allegations did not grow over time with this repeated questioning. As to Beth Ann, Ms. Schmidt found it necessary to use leading questions, as Beth Ann would not give spontaneous answers. Ct. Rec. 35, Exhib. 3, p. 608. The use of leading questions, when appropriate, does not necessarily render the response untrustworthy. Wright, 110 S.Ct. at 3148; citing J. Meyers, Child Witness Law and Practice §4.6, pp. 129-134 (1987). It appears that Beth Ann was so reluctant to talk about the subject after her initial disclosure that leading questions were the only possible means of confirming her earlier statements.

The totality of circumstances surrounding the making of these statements to Carol Schmidt, including, in addition to the factors found above, Rachel's seriousness and Beth Anne's reluctance to talk, support a finding of reliability in these statements.

(2) Statements to the Prosecutor as Recorded by Detective Marlin Bachler, and Statements by Rachel to Gerald Thiel.

Detective Bachler was present at interviews of the two girls by the prosecutor's office on October 11, and took notes of the interview. He testified as to the substance of Rachel's interview at trial. Rachel's father, Gerald Thiel, also testified to statements made by Rachel to him regarding the Swans. Due to the fact that both girls had already been questioned two or three times to this point, the circumstances surrounding the making of these statements indicate a lower level of reliability than the earlier statements. "[I]t is possible that 'if there is evidence of prior interrogation, prompting, or manipulation by adults, spontaneity may be

an inaccurate indicator of trustworthiness.'" Wright, 110 S.Ct. at 3152, citing State v. Robinson, 153 Ariz. 191, 201 (1987). However, the testimony as to statements made by the girls at these times was insignificant in impact when compared to the initial disclosures of the girls, and did not add anything new. Therefore, any error in admitting these hearsay statements due to inadequate indicia of reliability was harmless.

(3) Statements by Beth Ann to Her Foster Mother Cynthia Hermanson.

Mrs. Hermanson testified as a rebuttal witness. She recounted statements made by Beth Ann approximately a month prior to the trial, or some five months after the initial disclosures. Accordingly to Mrs. Hermanson, Beth Ann spontaneously brought up the subject of marbles while she was being dried off after a bath. When she was shown glass marbles and asked if that was what she meant, Beth Ann laughed and said no. Upon further questioning, she indicated that "marbles" were

part of her father's body, along with "a snake full of marbles." Ct. Rec. 35, Exhib. 8, p. 4-5.

This statement is surrounded by adequate indicia of reliability, despite its remoteness in time from the initial disclosures. In fact, that remoteness serves to enhance the trustworthiness of this statement, because the attention surrounding the earlier disclosures had faded. Both the complete spontaneity of this statement, and the child's guileless laughter when shown the glass marbles, indicate that the statement is reliable and could not have been tested to any great advantage by cross-examination.

Petitioner has also challenged the state court's finding of reliability in the hearsay statements by identifying apparently contradictory statements made by the two children, by suggesting that the trial court's finding that the children were incompetent to testify was incompatible with a finding of reliability in their statements, and by pointing to the absence of corroborating

medical evidence. None of these challenges has merit.

The two children did make some apparently contradictory or confusing statements to other witnesses after the initial disclosures. Among the statements identified by petitioner as indicating a lack of reliability in the hearsay statements in general are Rachel's statement to detective Marlin Bachler that Jerry (her father) "put marbles there," and Beth Ann's statement to her foster mother that the marbles to which she referred were not glass marbles but rather "Daddy's marbles." These statements are not as contradictory as petitioner would have this Court conclude.

Rachel's statement about her father took place in the course of an interview by the prosecutor in the presence of Detective Marlin Bachler. He testified that she answered his questions as follows:

> Q. Do you know there are parts of a body where we shouldn't be touched?
>
> There was no answer. However, she pointed to her genital area.

Q. Did anybody ever touch you there?

A. We can't talk about it.

Q. Did someone ever touch you there?

A. No. Jerry put marbles there.

Ct. Rec. 35, Exhib. 3, p. 662. At this time, Rachel was being interviewed by yet another stranger. This was her third interview within a week by adults who had shown some interest in hearing about marbles. The Court has already noted, above, that by the time of this interview the spontaneity which formed the basis of reliability of the initial disclosures had faded. Rachel's statement about her father did not, under these circumstances amount to an accusation against her father, and does not call into question the reliability of her earlier statements.

As to Beth Ann's hearsay statement to her foster mother about "Daddy's marbles" and "a snake filled with marbles," these statements are not necessarily at odds with a three-year-old girl's terminology regarding male anatomy. These statements, when taken in context, are

not incompatible with a finding that Beth Ann's earlier statements bear sufficient indicia of reliability.

At oral argument on the motion for summary judgment, petitioner argued that a finding of incompetence of a child to testify renders her hearsay statements unreliable almost per se. However, the Supreme Court specifically rejected the use of any such rule in Wright. "[W]e have in any event held that the Confrontation Clause does not erect a per se rule barring the admission of a prior statement of a declarant who is unable to communicate to the jury at the time of trial." Wright, 110 S.Ct. at 3151, citing Mattox v. United States, 156 U.S. 237, 243-244 (1895). The Court went on to note, however, that "such inability might be relevant to whether the earlier hearsay statement possessed particularized guarantees of trustworthiness." Id.

Here, the finding of incompetence of Beth Ann was based on her refusal to speak in court; that finding did not in any way

undermine the reliability of her earlier disclosures. As to Rachel, the fact that her initial answers to the court at the competency hearing were direct and truthful was far more relevant to the trustworthiness of her hearsay statements than was her contradictory answer to the confusing syllogism posed by the court.

Finally, petitioner suggest that the absence of corroborating medical evidence undermines the reliability of the hearsay statements. However, the Supreme Court has emphatically rejected the use of corroborating evidence to support a finding that a hearsay statement has the necessary guarantees of trustworthiness. Wright, 110 S.Ct. at 3150. Similarly, under the Supreme Court's test for trustworthiness, which focuses on the circumstances surrounding the making of the statement and which render the declarant particularly worthy of belief, the absence of corroborating physical evidence is irrelevant to the finding of reliability of hearsay statements. Moreover, the most striking of the disclosures by both girls involved the

allegations of oral sex; the absence of physical evidence bears no relation whatsoever to these allegations.

(2) Violation of Petitioners' Fifth and Fourteenth Amendment Rights in the State's Failure to Disclose that Lisa Conradi was Herself a Victim of Abuse.

At trial, Lisa Conradi testified regarding her interest in the subject of sexual abuse of children. She stated that she had taken classes in the subject after her own two children had been abused by another child. Ct. Rec. 35, Exhib. 5, pp. 5-7. Conradi claimed that she had exposed cases of child abuse in other settings where she had worked. She also made the statement on cross-examination that child abuse is "everywhere." Ct. Rec. 35, Exhib. 5, p. 124. Upon questioning, she explained this remark by stating her belief that child abuse can be found in all types of families and in all social strata. Id. at 125.

After the trial, Ms. Conradi was interviewed by an investigator for the

defense. Ct. Rec. 35, Exhib. 9, p. 33. During this interview, Conradi claimed to be herself a victim of child abuse, and also a former drug user. The defense moved for a new trial in part on the basis of what was characterized as newly discovered evidence of Ms. Conradi's obsession with child abuse. Ct. Rec. 35, Exhib. 9, p. 8-10. The trial court denied the motion.

In their habeas petition, petitioners contend that the failure of the prosecutor to disclose these facts about Ms. Conradi deprived them of due process and a fair trial. Petitioners have only briefly pressed this claim in opposing summary judgment. Ct. Rec. 68, P. 9. Petitioners contend that if the prosecutor knew of Ms. Conradi's own history of abuse prior to trial, then the withholding of this evidence violated the rule of Brady v. Maryland, 373 U.S. 83 (1963).

As a Brady claim, this claim fails because there is no evidence that the prosecutor actually knew of Ms. Conradi's own history of abuse prior to trial. Nor is it

clear that this information about Ms. Conradi, even if shown to be true, is necessarily exculpatory. The information was not qualitatively different from what was already revealed about Ms. Conradi through her testimony: she was a person who took a great interest in the subject of child abuse. In closing argument, the defense called attention to this, labelling it as bias or prejudice. Ct. Rec. 35, Exhib. 8, pp. 35, 43. Therefore, the fact that she might have been a victim of such treatment herself was not a material fact of exculpatory value in light of the information already before the jury.

(3) Presentation by the State of Physical Evidence of Sexual Abuse, Now Shown to be False, violated Petitioners' Fifth and Fourteenth Amendment Rights to a Fair Trial.

At trial, a nurse practitioner, Ted Ritter, testified that he had examined Beth Ann for evidence of sexual abuse shortly after the arrest of her parents. The examination was difficult because the child was extremely upset and uncooperative. Accordingly, he was

able to make only a cursory examination and estimation of the size of the vaginal opening; he did not actually note either the presence or absence of a hymen. He estimated that the introital opening was 1.0 to 1.2 centimeters, which is large for a three-year-old child. Ct. Rec. 35, Exhib. 2, p. 311-318.

On October 9, 1985, several days later, Beth Ann was again examined at the request of CPS, this time by her own pediatrician Dr. Parris. He testified that he noted no obvious signs of physical injury to the genital area, but he did not take note of the condition of the hymen. Ct. Rec. 35, Exhib. 2, p. 402-403. He concluded that the physical evidence was inconclusive, but that Beth Ann's behavior during the exam indicated a need for further evaluation. Id.

Petitioners have now brought forth the results of a 1991 genital examination of Beth Ann by Dr. Soderstrom, a gynecologist. In a sworn statement, Dr. Soderstrom states that his examination revealed an intact hymen, an introital opening of 5 millimeters, and no

evidence whatsoever of prior physical trauma to the genital area. He also states his opinion that the vaginal opening could not have been 1.0 to 1.2 centimeters in 1985, as estimated by Nurse Ritter. Ct. Rec. 44.

Petitioners contend that this newly discovered evidence shows that the State presented false evidence at trial, thus depriving them of a fair trial. This contention is without merit.

The medical evidence presented at trial regarding Beth Ann was inconclusive at best. Neither Nurse Ritter nor Dr. Parris noted whether the child had an intact hymen or not. Dr. Jenny, an expert on child sexual abuse, testified on behalf of the State that <u>if</u> Beth Ann's hymen were torn or absent, that could be indicative of sexual abuse, but it could also result from some other type of injury. Ct. Rec. 35, Exhib. 2, p. 452. As to Rachel, there was testimony from a defense witness, who conducted a complete gynecological examination, that there was no indication of trauma to the vaginal area whatsoever. Ct.

Rec. 35, Exhib. 7, pp. 49-50. Despite the inconclusiveness of physical evidence of abuse of Beth Ann, and the complete absence of such evidence with regard to Rachel, the jury found petitioners guilty of molesting both girls. This is understandable in light of the fact that the most damaging allegations from both girls concerned oral, not vaginal, intercourse. Since the medical testimony regarding Rachel's intact hymen made no difference to the jury's verdict, there is no basis for finding that newly discovered evidence of Beth Ann's status would have made any difference either.

(4) Ineffective Assistance of Counsel Claim.

Petitioners contend that defense counsel was ineffective in their failure to discover, prior to trial, that the medical evidence to be presented by the State with respect to Beth Ann was false. This claim is also without merit.

The medical evidence which petitioners characterize as false is Nurse Ritter's

testimony that he estimated the size of Beth Ann's introital opening as 1.0 to 1.2 centimeters, which is above the normal limits for a three-year-old girl. Dr. Soderstom, who examined Beth Ann in January, 1991, states that the introital opening now measures 5 millimeters and could not have measured 1.0 centimeters in 1985. This does not mean, however, that the evidence given by Nurse Ritter was false. It was clear from his testimony that the measurement he indicated was an estimate only, made under adverse conditions and poor light. As to the presence of a hymen, Nurse Ritter testified that he did not note either its presence or absence.

Petitioners argue that counsel was ineffective in failing to discover earlier that Beth Ann actually had an intact hymen. However, counsel did move prior to trial for an independent medical examination of Beth Ann by Dr. Soderstrom. Ct. Rec. 35, Exhib. 10, p. 298; Ct. Rec. 65, Exhib. 7. The State opposed the motion, arguing that another examination would further traumatize the child. The court

ruled that the defense would be entitled to such an examination only if the doctor who had already examined Beth Ann testified that he found evidence of penile penetration, or if he could not say whether such penetration occurred. Ct. Rec. 65, Exhib. 7, p. 10. Since neither Nurse Ritter nor Dr. Parris testified at all as to evidence of penetration, the independent examination was not carried out. Defense counsel did not renew their motion for the examination.

In order to succeed on a claim of ineffective assistance of counsel, a petitioner must show both that counsel's performance was deficient, that is, that counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment, and that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). Here, it cannot be said that counsel's performance was at all deficient, where they did move for an independent examination. And even if petitioners could

show such deficiency, there is no basis for finding that the deficiency prejudiced the defense. Evidence such as that sought by the independent examination was presented by the defense with respect to Rachel, that is, that her genital area was normal and her hymen intact. The jury nevertheless found petitioners guilty of sexual abuse of Rachel as well as Beth Ann.

CONCLUSION

The claims of constitutional violations at petitioners' trial are without merit. Respondents' motion for summary judgment should be granted, and the petition for habeas corpus denied. A proposed form of Order is attached.

DATED this 29th day of April, 1992.

Philip K. Sweigert
U. S. Magistrate Judge

**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

WILLIAM ORR SWAN; KATHLEEN ROLAND SWAN,
*Petitioners-Appellants,*

v.

KURT S. PETERSON, Warden of Washington Correctional Center; ELDON VAIL, Warden of Washington Correctional Center for Women; CHASE RIVELAND, Secretary of Department of Corrections,
*Respondents-Appellees.*

No. 92-35493
D.C. No. CV-90-965-WTM
OPINION

Appeal from the United States District Court
for the Western District of Washington
Walter T. McGovern, Senior District Judge, Presiding

Argued and Submitted
August 2, 1993—Seattle, Washington

Filed October 6, 1993

Before: Eugene A. Wright, Robert R. Beezer and Cynthia Holcomb Hall, Circuit Judges.

Opinion by Judge Wright

## SUMMARY

### Criminal Law and Procedure/Defendants and Accused, Rights of/Evidence

The court of appeals affirmed a district court judgment, holding that admission of child victims' hearsay statements in a child sexual abuse trial did not violate the defendants' rights to confrontation when the statements bore sufficient "indicia of reliability" and the children were deemed "unavailable" for hearsay purposes.

Appellants William and Kathleen Swan's daughter B.A. attended a day-care center. B.A. allegedly made a comment to the center's new assistant that her parents had touched her "private parts," and after further questioning, allegedly told the assistant about sexual games with her parents.

The center's manager called the state's child protective services agency. She then spoke with B.A., who allegedly stated that the games sometimes included her friend, R.T. Two agency caseworkers talked with B.A., but the interview was inconclusive. The next day, R.T. came to the center but B.A. did not. The manager questioned R.T. about the Swans and the games they played together, and R.T. allegedly described activities similar to those B.A. had disclosed.

The Swans faced charges of statutory rape. The trial court concluded that the girls were not competent to testify. The state introduced the children's statements to the day-care workers and other hearsay statements under Washington's statutory child sexual abuse hearsay exception. Before the admission of each statement, the trial court ensured that it met the reliability and corroboration requirements of the statutory exception. The jury found the Swans guilty.

The Washington court of appeals reversed, holding that the statements lacked sufficient corroboration. The state supreme

court reinstated the convictions, agreeing generally with the superior court's determinations.

The Swans petitioned the district court for a writ of habeas corpus, contending that the admission of the children's hearsay statements violated the Confrontation Clause. The district court denied the petition on summary judgment.

[1] As the statements were admitted under a nontraditional hearsay exception, the state had the burden to demonstrate reliability by showing "particularized guarantees of trustworthiness." [2] Concerning the children's initial statements about abuse, the trial court made three reliability findings of the type approved by the Supreme Court for a child's hearsay statements: (1) neither girl had a motive to lie; (2) both girls described sexual acts in specific terms; and (3) most of the statements were spontaneous responses to open-ended questions or to no questions at all. [3] The district court agreed with the state court's findings, after conducting an independent review of the transcripts.

[4] The state and district courts' spontaneity determinations were not clearly erroneous. [5] The finding that the girls had no motive to lie was not clearly erroneous.

[6] The Swans argued that the statements were unreliable because the day-care workers were predisposed to find abuse. [7] The Confrontation Clause does not mandate a threshold assessment of the reporting witness's credibility before the admission of hearsay evidence.

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## COUNSEL

David Allen, Allen & Hansen, Seattle, Washington, for the petitioners-appellants.

Charles R. Nesson, Cambridge, Massachusetts, Amicus Curiae, in support of the petitioners-appellants.

Paul D. Weisser, Assistant Attorney General, Olympia, Washington, for the respondents-appellees.

## OPINION

WRIGHT, Circuit Judge:

When the crime is child sexual abuse, one of the more difficult to detect and prosecute, a conviction hinges often on the words of children. What makes this case troubling is that the children did not testify at trial. On the basis of hearsay statements, supported by minimal corroborating evidence at best, a state jury convicted William and Kathleen Swan of sexually abusing their three-year-old daughter and her friend. The Swans have exhausted their state court remedies and appeal the district court's denial of their habeas corpus petition.

Our main issue is whether admission of the children's hearsay statements violated the Swan's Sixth Amendment Confrontation Clause rights. The Swans also argue that the state withheld information that a key reporting witness had once been sexually abused, that newly discovered medical evidence indicated that their daughter was not molested and that they received ineffective assistance of counsel. We affirm the dismissal of the habeas petition.

## I. BACKGROUND

The sexual abuse charges stemmed from statements made by the Swans' daughter, B.A., and her three-year-old friend, R.T., to day-care center workers. The two children attended a day-care facility managed by Cindy Bratvold. She had hired Lisa Conradi as the center's new part-time assistant. The dis-

turbing allegations arose on Conradi's second day of work. She told B.A. to keep her dress covered over her tights, reminding her that no one should look at o touch her "private parts." Conradi said that B.A. responded "Uh-huh, Mommy and Daddy do." After further questioning, the child allegedly told Conradi about games with her parents involving sexual acts.

Conradi alerted Bratvold, who called Child Protective Services, a state agency. Bratvold then spoke with B.A., who allegedly told her that the games sometimes included her friend, R.T. Two CPS caseworkers arrived and talked with B.A., but the interview was inconclusive. They ended it when Kathleen Swan arrived to take her daughter home.

R.T. came to the center the next day, but B.A. did not. Bratvold asked R.T. about the Swans and what types of games they played together. R.T. allegedly described activities similar to what B.A. had disclosed, including genital touching and oral sex.

These initial statements to the day-care workers were the most damaging. The Washington Supreme Court reviewed in detail the trial testimony about these events. *State v. Swan*, 790 P.2d 610, 616-618 (Wash. 1990), *cert. denied*, 498 U.S. 1046 (1991). We need not repeat those findings, except to say that the implications are grave and alarming. The children demonstrated precocious sexual knowledge, describing multiple episodes of abuse by the Swans, which, if believed by a jury, would warrant conviction.

After interviews with a CPS caseworker, the police were called and the children placed in protective custody. The state charged both Swans with two counts of statutory rape. Superior Court Judge Ellington conducted pretrial hearings to determine whether the young girls were competent to testify. After observing them, the judge concluded that, because of their youth and inability to answer questions in court, they

could not satisfy the competency requirements. The Swans do not contest this ruling.

The state introduced the children's statements to the day-care workers under Washington's statutory child sexual abuse hearsay exception, RCW § 9A.44.120.[1] Under the same exception, the state introduced other disputed hearsay evidence, including the children's disclosures to the caseworker, B.A.'s statements to her foster mother and R.T.'s statements to her father and a police detective.

Before the admission of each statement, Judge Ellington, assisted by counsel, conducted extensive preliminary examinations of the reporting witnesses outside the presence of the jury. Once satisfied that a statement met the reliability and corroboration requirements of the statutory exception, the court allowed it into evidence. The jury returned guilty verdicts.

The Washington Court of Appeals reversed, holding that the statements lacked sufficient corroboration as required by the hearsay statute. The State Supreme Court disagreed and reinstated the convictions.

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[1]At the time, RCW § 9A.44.120 read:

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in . . . criminal proceedings . . . if:
>
> (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
>
> (2) The child either:
>
> (a) Testifies at the proceeding; or
>
> (b) Is unavailable as a witness: *Provided*,
>
> That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

The Swans petitioned the district court for a writ of habeas corpus, arguing that: (1) the admission of the hearsay statements violated the Confrontation Clause; (2) the state withheld favorable *Brady* evidence; namely, that day-care worker Conradi had been sexually abused; (3) newly discovered evidence showed that their daughter's hymen is intact; and (4) they received ineffective assistance by retained counsel. The court adopted the Report and Recommendation of the magistrate judge and denied the petition on summary judgment.

## II. ANALYSIS

### CONFRONTATION CLAUSE

#### A. *Standard of Review and the Presumption of Correctness*

We begin our analysis mindful that this is a habeas corpus proceeding, not direct review of a criminal conviction. The Swans have already had the opportunity to litigate their claims in the state courts. Washington's highest court upheld their convictions. Different principles apply on collateral review, constraining the role of a federal appellate court. As the Supreme Court recently reminded us, we may not second-guess the state courts:

> Direct review is the principal avenue for challenging a conviction. "When the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials."

*Brecht v. Abrahamson*, 113 S. Ct. 1710, 1719 (1993) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)).

We review de novo the decision to deny the habeas petition and, to the extent we need to review the district court's factual

findings, the clearly erroneous standard applies. *Hendricks v. Zenon*, 993 F.2d 664, 668 (9th Cir. 1993).

Under 28 U.S.C. § 2254(d), we accord a presumption of correctness to the state courts' factual findings. But this presumption does not apply to the state courts' resolution of mixed questions of law and fact. *Acosta-Huerta v. Estelle*, 954 F.2d 581, 585 (9th Cir. 1992). Whether the hearsay statements were sufficiently reliable to be admitted without violating the Confrontation Clause is a mixed question. *See United States v. Owens*, 789 F.2d 750, 757-58 (9th Cir. 1986) (admission of hearsay statement by assault victim who later suffered memory loss), *rev'd on other grounds*, 484 U.S. 554 (1988); *see also Myatt v. Hannigan*, 910 F.2d 680, 685 (10th Cir. 1990) (hearsay declarations of child sexual abuse victim).

Consequently, we accord deference to the state courts' factual findings regarding the timing, manner and circumstances of the hearsay statements. We review de novo the ultimate determination that the Swans' Confrontation Clause rights were not violated.

B. *Sufficient Indicia of Reliability*

The Confrontation Clause and the hearsay rule are not coextensive. Although both protect similar values, each sets independent prohibitions on admissibility. *See Ohio v. Roberts*, 448 U.S. 56, 62-65 (1980). The Clause does not necessarily bar the admission of hearsay statements. Most evidence that falls under a recognized hearsay exception may be admitted without confrontation because of its presumed trustworthiness. But the Clause may prohibit introducing some evidence that otherwise would be admissible under a hearsay exception. *Idaho v. Wright*, 497 U.S. 805, 813-14 (1990).

A statement falling under an exception will also be admissible under the Clause if the prosecution demonstrates the

unavailability of the declarant and that the statement bears adequate "indicia of reliability." *Roberts*, 448 U.S. at 66.

The Swans do not contest the trial court's determination that the children were incompetent to testify and "unavailable" for hearsay purposes.[2] The crux of this appeal is whether the incriminating statements bore sufficient "indicia of reliability" to withstand scrutiny under the Clause.

The reliability requirement is satisfied if a statement falls within a "firmly rooted hearsay exception" or if it is supported by "a showing of particularized guarantees of trustworthiness." *Wright*, 497 U.S. at 818. The trial court admitted the statements under Washington's child sexual abuse hearsay exception. Enacted in 1982, this exception is relatively new and not firmly rooted.

[1] As the statements were admitted under a nontraditional exception, the state, as proponent of the evidence, had the burden to demonstrate reliability by showing "particularized guarantees of trustworthiness." The proof is based on consideration of the totality of the circumstances but "the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief." *Id.* at 819.

The Supreme Court, in *Wright*, identified several factors bearing on the reliability of a child's hearsay statements: (1) spontaneity and consistent repetition; (2) mental state of the declarant; (3) use of terminology unexpected of a child of similar age; and (4) lack of motive to fabricate. *Id.* at 821-22 (citing cases). But no mechanical test prevails and "courts

[2]We have no reason to decide whether *White v. Illinois*, 112 S. Ct. 736, 741 (1992), limits the unavailability requirement to cases involving the admission of prior testimony.

have considerable leeway in their consideration of appropriate factors." *Id.* at 822.[3]

Despite this latitude, other corroborating evidence may not be considered in assessing the hearsay's reliability. This would permit "admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial." *Id.* at 823. It also presents dangers because of the problem of selective reliability.[4]

C. *Initial Statements About Abuse*

**1. Relevant factors and impermissible bootstrapping**

**[2]** We consider first the girls' initial statements to the day-care workers. In evaluating the admissibility of these remarks, the trial court made three reliability findings of the type explicitly approved by the Court in *Wright*: (1) neither girl had a motive to lie; (2) both girls described sexual acts in specific terms, using age-appropriate language; and (3) most of the statements were spontaneous responses to open-ended questions or to no questions at all. The court also found that the girls had a reputation for truthfulness and that the disclosures were made to adults who had relationships of trust with the girls. These latter factors do not seem inappropriate, given *Wright*'s emphasis that trial courts have considerable leeway in making reliability determinations.

---

[3]The Washington Supreme Court has identified a similar list of factors bearing on the reliability of a child sexual abuse victim's hearsay statements. *State v. Ryan*, 691 P.2d 197, 205 (Wash. 1984); *State v. Parris*, 654 P.2d 77, 80 (Wash. 1982).

[4]For example, corroboration of a child's allegations of sexual abuse by medical evidence may tend to show that abuse occurred but it sheds no light on the allegations of the *identity* of the abuser. A jury might rely on the partial corroboration to mistakenly infer the trustworthiness of the entire statement. *Wright*, 497 U.S. at 824.

But the court relied improperly upon one additional factor. It observed that the girls "made the statements on two consecutive days without the children having discussed the matter and giving basically the same content to the statements, I think is a strong indicator of reliability." This is impermissible bootstrapping as the court referenced other evidence in finding cross-corroboration of each child's statements.[5] "To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of *its* inherent trustworthiness, not by reference to *other evidence* at trial." *Id.* at 822 (emphasis added).

[3] We do not analyze separately the findings of the Washington Supreme Court as it agreed generally with the trial court's determinations. *See Swan*, 790 P.2d at 628-630. The district court conducted an independent review of the transcripts. It agreed with the state courts that (1) the statements were spontaneous; (2) neither girl had a motive to lie; (3) they did not have a tendency to lie; and (4) most significant to the district court, the statements included "a description of oral intercourse which was so specific, and showed such inappropriate and precocious knowledge, that it would be difficult to see this knowledge as anything other than the result of personal experience."

But the court also made the same bootstrapping mistake as did the state courts. It found relevant that "[t]he allegations made by the girls were consistent, *both with one another's reports* and with each girl's later reports of the same activities." (emphasis added).

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[5]The court probably emphasized other corroborating evidence because of the requirements of the Washington child sexual abuse hearsay statute. It requires a trial court to make separate determinations of reliability *and* corroboration before admitting a hearsay statement when the child is unavailable to testify. *Swan*, 790 P.2d at 615. The trial court did not make separate determinations but instead apparently blended the inquiries. *Id.* at 616.

Nevertheless, we do not conclude that the bootstrapping errors of the state courts and the district court tainted their reliability determinations. Neither the state courts nor the district court indicated that cross-corroboration was a primary reason for finding the statements reliable; indeed, the district court found most significant the knowledge of sexual acts unexpected of children of that age.

**2. Spontaneity**

We turn next to the other reliability findings. In particular, the Swans dispute that the statements were spontaneous. They say that the day-care workers prompted the girls' initial remarks. According to her preliminary testimony, Conradi told B.A. that no one should touch her private parts and the girl responded "Mommy and Daddy do." Although this statement did not come out of the blue, it was not made in response to any question posed by Conradi. Other statements made by B.A. at that time seemed impulsive, such as when, while playing a game of peekaboo, the girl said that "My daddy puts his penis in my mouth and icky milk comes out."

**[4]** Similarly, R.T.'s statements were made in response to Bratvold's open-ended questions, such as "What kinds of games do you play with Bill [Swan]?" This contrasts with the leading questions the Supreme Court criticized in *Wright*. *See* 497 U.S. at 810 ("Do you play with daddy? Does daddy play with you? Does daddy touch you with his pee-pee? Do you touch his pee-pee?").[6] We find no clear error in the state and district courts' spontaneity determinations.

[6]Somewhat troubling is Bratvold's admission that she began to cry upon hearing R.T.'s allegations about Kathy Swan, but continued interviewing the girl. This at least raises the question whether the day-care worker's change in demeanor may have, in a subtle way, prompted R.T.'s additional statements. *Cf. Wright*, 497 U.S. at 826-827 (if there "is evidence of prior interrogation, prompting, or manipulation by adults, spontaneity may be an inaccurate indicator of trustworthiness"). Bratvold was not trained professionally to interview child sexual abuse victims. But we decline to speculate endlessly from a cold reading of the record. We defer to the trial court's conclusions that Bratvold did not direct the girl's answers.

### 3. No motive or tendency to lie

[5] We also find no clear error in the finding that the girls had no motive to lie. The Swans do not suggest any motive. They contend instead that the day-care workers, and particularly Conradi, were biased. That, however, does not suggest that the girls themselves had a reason to lie.

Next, the Swans argue that the courts erred in finding that the girls were generally not prone to lie. They note that R.T.'s father testified that she occasionally had make-believe companions and pretended to have gone somewhere the day before when she had not. And she told the police that "Jerry," possibly a reference to her father Gerald, put "marbles" in her genital area. She said that she had related the same information to Bratvold, who denied that R.T. had made such a statement to her.

The testimony of R.T.'s father is not dispositive. Children pretend. This does not reveal a tendency to prevaricate. R.T.'s later statement about "Jerry" suggests a possible problem with lying. Whether the Swans may rely on a later statement to undermine the reliability of R.T.'s earlier statements, however, is unclear. *Wright* forbids using other corroborating evidence at trial to show that an initial hearsay statement is reliable. The issue here is subtly different: can arguably *noncorroborating* evidence be used to demonstrate the *unreliability* of a hearsay statement? *Wright*'s caution against reference to other evidence at trial suggests not.[7]

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[7]Because *Wright* holds that the consistency of a child witness's allegations bears on the reliability of an initial hearsay statement, arguably a later *inconsistent* statement should also be evaluated in making the reliability determination. This does not mean, however, that R.T.'s later allegation undermines the reliability of her earlier statements. The statement about "Jerry" was not necessarily inconsistent because it may have referred to entirely different events than those involving the Swans.

Regardless, the district court considered this later statement but discounted it. The court reasoned that the accusation was ambiguous and that, by that time, several adults had questioned R.T. and the spontaneity surrounding her answers had faded. This determination was not clearly erroneous.

### 4. Effect of child declarant's incompetence

The Swans say that R.T.'s faulty performance at the competency hearing precludes a finding that her hearsay statements had sufficient guarantees of trustworthiness.[8]

The Supreme Court rejected a similar argument in *Wright*. *Id.* at 825 ("the Confrontation Clause does not erect a *per se* rule barring admission of prior statements of a declarant who is unable to communicate to the jury at the time of trial"). The Swans would distinguish *Wright*, arguing that there the trial court found the child incapable only of communicating to the jury but here the incompetency problems were broader and more damaging.

The trial court recognized the distinction between R.T.'s ability to testify in a courtroom setting and to tell the truth at the time of the declarations. It clearly considered her incompetent only as to the former. We defer to its finding.

### 5. Credibility of the reporting witness

[6] The Swans say that the statements were unreliable because the day-care workers, especially Conradi, were predisposed to find child abuse. Amicus supports this position. Amicus essentially makes a policy argument that in cases involving nontraditional hearsay exceptions, the trial court

[8]Among other remarks, R.T. said that she had been in the courtroom 40 times (she had never been there before), she had seen defense counsel four days earlier (she had not) and her dress was "blue, sort of, but it's pink" (it was blue).

should be vigilant in assessing reliability by making a preliminary evaluation of the reporting witness' credibility. Whatever the merits of this view, a federal habeas court may not prescribe evidentiary rules for the states. We may grant relief only if there is serious constitutional error.

[7] We do not read the Confrontation Clause as mandating a threshold assessment of the reporting witness's credibility before the admission of hearsay evidence. The Supreme Court has limited the reliability inquiry required by the Clause to whether the circumstances surrounding the making of the statement "render the *declarant* particularly worthy of belief." *Id.* at 820 (emphasis added). Unlike the declarant, the reporting witness is subjected to cross-examination and the requirements of an oath. *See United States v. Hinkson*, 632 F.2d 382, 385 (4th Cir. 1980) (discussing trustworthiness requirement included in the analogous residual hearsay exception, Fed. R. Evid. 803(24)). *See also* John E.B. Myers, *Evidence in Child Abuse and Neglect*, § 7.45, at 249, 262, 264 (2d ed. 1992) (reporting witness' credibility not a reliability factor that surrounds the making of the statement). The jury, not the trial judge, must weigh the reporting witness's credibility.

Obviously the trial court must make some inquiries, such as deciding whether a witness is competent to testify. But the Confrontation Clause does not require the court to take basic credibility determinations from the jury.

D. *Later Hearsay Statements*

**1. Statements to CPS caseworker**

In admitting the girls' statements to the CPS caseworker, the trial court found indicia of reliability because (1) more than one person was present when the statements were made; (2) some responses were spontaneous; (3) neither girl had a motive to lie and they had relationships of trust with the adults. It noted that leading questions had been asked of B.A.

but concluded that direct questions are sometimes appropriate for difficult child witnesses and that the girl's answers were consistent with her other spontaneous statements. The district court agreed with these findings.

Although we are troubled by the use of leading questions,[9] this does not necessarily render B.A.'s responses untrustworthy. *See United States v. George*, 960 F.2d 97, 100 n.2 (9th Cir. 1992); Myers, *supra*, § 4.5 at 229-239. The consistency of the girl's statements with her earlier statements is the critical reliability factor here. We conclude that it provided a particularized guarantee of trustworthiness.

**2. Statements to R.T.'s father and to police detective**

These statements had a low level of reliability because, when allegedly made, several adults had already questioned the girls. But we agree with the district court that any error in admitting the statements was harmless because the evidence was "insignificant in impact when compared to the initial disclosures of the girls, and did not add anything new."

**3. Statements to B.A.'s foster mother**

In admitting this hearsay evidence, the trial court found indicia of reliability because (1) B.A. had no motive to lie; (2) she had the character for truthfulness; and (3) the statements were "basically spontaneous." The district court made similar findings.

The spontaneity of the statements is questionable. They occurred some five months after B.A.'s initial disclosure and after many interviews. We are not persuaded by the district

[9] *See, e.g., Wright*, 497 U.S. at 826; Stephen Ceci & Maggie Bruck, *Suggestibility of the Child Witness: A Historical Review and Synthesis*, 113 Psychol. Bull. 403 (1993); Daniel Goleman, *Studies Reveal Suggestibility of Very Young as Witnesses*, N.Y. Times, June 11, 1993, at A1, A9.

court's reasoning that attention surrounding the earlier allegations had faded. Among other things, B.A. had been seeing a therapist and doubtless was asked about the earlier events, even if indirectly.

But again the critical factor is the consistency of the statements with B.A.'s earlier allegations. Under the totality of the circumstances, we find that it provided an adequate sign of reliability.

## SUFFICIENCY OF THE EVIDENCE

Amicus argues that "a criminal defendant cannot be convicted on the basis of hearsay alone." Even if hearsay can pass the admissibility threshold, says Professor Nesson, it is inherently deficient, without other corroborating evidence, for reaching a conclusion of guilt beyond a reasonable doubt.

We decline to address this argument because it is raised for the first time on appeal and not by the Swans. Although they challenged properly the sufficiency of the evidence in the trial court by a motion to dismiss at the close of the evidence, they did not raise this issue in their habeas petition.

Generally, we do not consider on appeal an issue raised only by an amicus. *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1581 n.9 (9th Cir. 1986) (amicus may not frame the issues for appeal); *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 862 (9th Cir. 1982) (same). Discretionary exceptions exist where a party attempts to raise the issue by reference to the amicus brief. *See United States v. Van Winrow*, 951 F.2d 1069, 1072 (9th Cir. 1991); *Toussaint v. McCarthy*, 801 F.2d 1080, 1106 n.27 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987). And we have reached the issue where it involves a jurisdictional question or touches upon an issue of federalism or comity that could be considered sua sponte. *See Stone v. City and County of San Francisco*, 968 F.2d 850, 855-56 (9th Cir. 1992) (federalism and comity), *cert. denied*, 113 S. Ct.

1050 (1993); *Miller-Wohl Co. v. Commissioner of Labor and Industry*, 694 F.2d 203, 204 (9th Cir. 1982) (jurisdiction); *Chadha v. INS*, 634 F.2d 408, 411-12 (9th Cir. 1980) (same), *aff'd*, 462 U.S. 919 (1983).[10]

The Swans did not adopt amicus' argument by reference in their brief and none of the other exceptions apply. The issue has been waived.[11]

## BRADY VIOLATION

The Swans contend that the state violated their due process rights when it suppressed evidence that Conradi, the day-care worker who was the key reporting witness, had been sexually abused. The district court rejected this contention without a hearing. It found no evidence that the state knew Conradi had been sexually abused, and concluded that this was not a material fact of exculpatory value.

During a pretrial deposition, defense counsel asked Conradi whether she had ever been abused. The prosecutor advised her not to answer unless relevancy could be shown. No attempt was made either to show relevancy or to require an answer to the question. The Swans argue that the prosecutor's advice demonstrates that the state knew of Conradi's past victimization or, at least, that the court should have granted an eviden-

[10]In *United States v. Sherbondy*, 865 F.2d 996 (9th Cir. 1988), an anomalous case, we addressed an issue raised on appeal only by an amicus. We did so because the issue was purely legal and involved interpretation of a new statute. *Id.* at 1001 n.8. But the authority *Sherbondy* relied upon concerned only when a party, as opposed to an amicus, may raise an issue for the first time on appeal. *See Abex Corp. v. Ski's Enters., Inc.*, 748 F.2d 513, 516 (9th Cir. 1984).

[11]We also note that whether the Swans' convictions rested on hearsay alone is unclear. The Washington Supreme Court found the medical evidence regarding B.A. and also, to a lesser extent, R.T.'s play with an anatomically correct doll, somewhat corroborative. *See Swan*, 790 P.2d at 624.

tiary hearing to determine whether the prosecutor knew, but did not disclose, that she had been abused.

The Swans were entitled to an evidentiary hearing only if they alleged facts that, if proved, would entitle them to relief and if they did not receive a full and fair evidentiary hearing in the state court. *See Greyson v. Kellam*, 937 F.2d 1409, 1412 (9th Cir. 1991). We review for an abuse of discretion the decision to deny an evidentiary hearing. *Id.*

The government must disclose evidence favorable to a defendant and material to either guilt or punishment. *United States v. Streit*, 962 F.2d 894, 900 (9th Cir.) (citing *United States v. Bagley*, 473 U.S. 667, 674 (1985) and *Brady v. Maryland*, 373 U.S. 83, 87 (1963)), *cert. denied*, 113 S. Ct. 431 (1992). Evidence is "material" only if a reasonable probability exists that, had it been disclosed, the result would have been different. *United States v. Kennedy*, 890 F.2d 1056, 1058 (9th Cir. 1989), *cert. denied*, 494 U.S. 1008 (1990). Evidence undermining the credibility of a government witness must be disclosed when the reliability of the witness may be determinative of the defendant's guilt or innocence. *United States v. Brumel-Alvarez*, 991 F.2d 1452, 1458 (9th Cir. 1993).

The defense learned of the abuse from a post-trial interview of Conradi conducted by a defense investigator posing as a journalist. In the interview, Conradi said that she saw abuse everywhere in her neighborhood. She also claimed to have called Child Protective Services and "turned in at least 20 kids," who were abusing other children.

Although information about Conradi's abuse was not before the jury, it heard similar evidence undermining her credibility. She testified that her own children had been sexually abused and that she took a seminar to learn more about the subject, in part, because of their experience. During cross-examination, she admitted that she saw evidence of abuse "everywhere." On redirect, she clarified the statement by say-

ing that she meant that child sexual abuse can be found in all social strata. Both defense attorneys argued in closing that she was predisposed to find sexual abuse because of her personal experience with it.

The jury knew that Conradi's children were sexually abused and heard argument that she was biased as a result. But apparently it credited her testimony. There is no reasonable likelihood that additional evidence of Conradi's own abuse would have altered the verdict.

## NEWLY DISCOVERED EVIDENCE

Almost five years after the trial, Dr. Richard Soderstrom conducted a routine gynecological examination of B.A. The Swans argue that his findings, that she had a normal, intact hymen and that her introital opening (the opening into the vagina) could not previously have been 1 to 1.2 centimeters, constitutes newly discovered evidence justifying a new trial. They add that the evidence presented at trial regarding this issue was false and they were denied due process.

Newly discovered evidence is a ground for federal habeas corpus relief only when it bears on the constitutionality of an applicant's conviction, *Herrera v. Collins*, 113 S. Ct. 853, 860 (1993), and would " 'probably produce an acquittal,' " *Harris v. Vasquez*, 949 F.2d 1497, 1523 (9th Cir. 1990) (inner quotation omitted), *cert. denied*, 112 S. Ct. 1275 (1992).

We agree with the state that this new evidence is insignificant. The Swans were convicted of the statutory rape of R.T. even though physical evidence of sexual abuse as to her was nonexistent. The convictions were based upon the evidence of oral sex,[12] which was substantially the same for B.A. as for R.T.

[12]The statute under which the Swans were convicted, former RCW § 9A.44.070, defined sexual intercourse to include oral sex.

True, the jury may have convicted the Swans of raping B.A. based upon the physical evidence, but convicted them of raping R.T. because her out-of-court statements paralleled those of B.A. But even under this unlikely scenario, evidence about the intact hymen probably would not have produced an acquittal.

Nurse Practitioner Theodore Ritter said that when he examined B.A. he did not notice the presence or absence of the hymen. He said, however, that ordinarily an examiner cannot see into the vagina due to the presence of the hymen, but that he was able to see into B.A.'s vagina. He estimated that her introital opening was 1 to 1.2 centimeters, though he did not measure it. Another state witness, Dr. Carol Jenny, testified that Ritter's observations meant only that Ritter could see through the hymenal opening, and that an accurate measurement of the vaginal introitus is obtainable only with a measuring device, which Ritter did not use.

Dr. Lawrence Parris also testified for the state. He said that he examined B.A. and found no evidence of physical injury to her genitalia. He also said that he did not notice the presence or absence of a hymen.

Contrary to the Swans' contentions, the newly discovered evidence does not contradict materially the evidence presented at trial. At most, it could have been used to impeach Ritter's testimony concerning the size of the introital opening. It does not demonstrate that the state's evidence was false. It was merely equivocal.

## INEFFECTIVE ASSISTANCE OF COUNSEL

The Swans argue that their trial attorneys' failure to discover that the state's medical evidence regarding B.A. was false constitutes ineffective assistance of counsel.

They must show deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687-90 (1984). In

light of our conclusion that the new medical evidence would not with reasonable likelihood have altered the result, the Swans cannot show prejudice. Their ineffective assistance claim fails.

**AFFIRMED.**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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|---|---|---|
| WILLIAM ORR SWAN; KATHLEEN ROLAND SWAN, | ) | No. 92-35493 |
| Petitioners-Appellants, | ) | D.C. No. CV-90-965 WTM |
| v. | ) | ORDER |
| KURT S. PETERSON, Warden of Washington Correctional Center; ELDON VAIL, Warden of Washington Correctional Center for Women; CHASE RIVELAND, Secretary of Department of Corrections, | ) | |
| Respondents-Appellees. | ) | |

Before: WRIGHT, BEEZER and HALL, Circuit Judges.

The panel has voted to deny the petition for rehearing, and Judges Beezer and Hall have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to

rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is **DENIED** and the suggestion for a rehearing en banc is **REJECTED.**

MOTION FILED

MAY 17 1994

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NO. 93-1633

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

October Term, 1993

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WILLIAM O. SWAN AND
KATHLEEN R. SWAN,

Petitioners,

v.

KURT S. PETERSON, WARDEN OF WASHINGTON CORRECTION CENTER, ET AL.,

Respondent.

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On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

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# MOTION FOR LEAVE TO FILE AND BRIEF OF CHARLES R. NESSON, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Amicus Curiae

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May 12, 1994

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**MOTION BY CHARLES R. NESSON FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

Pursuant to Supreme Court Rule 37.2, Charles R. Nesson respectfully moves this Court for leave to file the accompanying *Amicus Curiae* Brief in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. Petitioner has consented to leave for this purpose. Respondent has not.

**NATURE OF *AMICUS'* INTEREST**

I am a professor of Evidence at Harvard Law School, co-author of Green and Nesson, *Problems, Cases, and Materials on Evidence* (Little Brown, Boston, 2nd ed. 1994), and the author of various law review articles dealing with the nature

and sufficiency of evidentiary proof.[1] I submit this brief in support of the petition of William and Kathleen Swan.

I became interested in this case after viewing a segment of the CBS television program "Sixty Minutes". Sixty Minutes presented the case as an injustice resulting from over-zealous response to concerns about abuse of children. They described a case in which the Swans, a middle-class suburban couple, lost their child and their freedom solely on the basis of uncorroborated and contradicted hearsay. I pursued the case in the law reports, expecting to find that Sixty Minutes had presented it unfairly by leaving out crucial evidence against the Swans. I found, to the contrary, the most extreme example of erosion of the

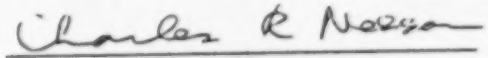
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[1]See e.g., Nesson, The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts, 98 Harv. L. Rev. 1357 (1985).

Confrontation Clause of which I am aware.

I have no financial interest in this case, nor any personal acquaintance with the Swans. My concern for this case is that of a law teacher who wants the law in his field to be coherent and of a citizen who wants the law of his country to be just. I respectfully ask the Court to consider the following brief addressed to the issues presented by the Swans' petition.

Respectfully submitted,



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**BRIEF *AMICUS CURIAE* OF CHARLES R. NESSON IN SUPPORT OF PETITIONERS**

## INTRODUCTION

This case provides the Court an opportunity to develop a consistent and comprehensive rationale for relating hearsay to the Confrontation Clause. The Court has struggled to give meaning to the Confrontation Clause while still recognizing that hearsay evidence is often useful to fact finders. The law of confrontation and hearsay, however, has become significantly intermeshed and confused. Yet, the integrity and credibility of the judicial process depends upon judges having an effective constitutional standard by which to limit the use of hearsay accusations in criminal trials. Without such a standard, accusations become easy to make and devastatingly impossible to defend, regardless of the truth.

Amicus urges that the right of confrontation be understood as the defendant's right to test the accusation against him. Accusations come in two forms, direct and hearsay. A direct accusation must be subject to testing by cross-examination. A hearsay accusation should be recognized as a form of circumstantial evidence and should be subjected to two separate tests: a foundation test for admissibility, already recognized by this Court in Idaho v. Wright[2], and a corroboration test for sufficiency.

First, in the foundation test for admissibility, the trial judge should analyze the circumstances surrounding the supposed making of the statement and the reliability of the mode of its transmission into court. Was there any

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[2]497 U.S. 805 (1990).

motive to misstate or opportunity for misunderstanding? Is there any reason to doubt the accuracy of the declarant's memory or perception or use of language? Was the declaration elicited or spontaneous? Was the person who supposedly heard the hearsay accusation biased in any way that might have led that person even unconsciously to communicate to the declarant an expectation of the kind of statement that was wanted or to misperceive, misremember, or misreport the statements the declarant actually made? Answers to these questions, and more like them, at the level of admissibility distinguish hearsay worth admitting into evidence from hearsay which is unreliable.

Second, in the corroboration test for sufficiency, the trial judge should ask whether there is sufficient evidence corroborating the hearsay accusation to justify a conclusion beyond reasonable

doubt that the accusation is true. This test recognizes that doubt is implicit in the nature of a hearsay accusation, even one that has passed the initial foundational hurdles to admissibility. Without corroboration, doubt necessarily remains to infect any resulting guilty verdict because the doubt is built into the structure of proof. If the hearsay accusation is not sufficiently corroborated, the trial judge should not permit the case to go to the jury.

This interpretation of the Confrontation Clause would distinguish confrontation from hearsay, leave hearsay law and its mess of exceptions to lower levels of common law elaboration, and reserve for the constitutional realm a more general and elevated principal of

justice to bound the outside limits of common law practice.[3]

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[3]See Jonakait, Restoring the Confrontation Clause to the Sixth Amendment, 35 UCLA L. Rev. 557 (April 1988).

## QUESTIONS PRESENTED BY THE SWAN CASE WHICH WILL STRUCTURE A CONSTRUCTIVE RECONCILIATION OF HEARSAY AND CONFRONTATION

1. When determining the reliability of a hearsay accusation pursuant to the Confrontation Clause, should a trial judge consider evidence that contradicts the hearsay accusation?

2. Can a hearsay accusation be considered reliable when the accuser has been judicially determined to be unable to speak the truth or accurately remember the past?

3. When determining the reliability of a hearsay accusation pursuant to the Confrontation Clause, should a trial judge consider the credibility of the hearsay reporter?

4. Does the Confrontation Clause prevent a court from convicting a criminal defendant solely on the basis of hearsay?

## STATEMENT AND DISCUSSION OF THE CASE

The Swans are a well-educated, married couple without any prior criminal history. On the basis of hearsay statements of two three-year-old girls, uncorroborated by any physical evidence, they were convicted of statutory rape and sentenced to prison for fifty months.

The hearsay statements -

- accused the Swans of sexual intercourse ("[Daddy] puts his potty in me and it hurts real bad."[4]; "[Bill] puts his peepee -- [points to the vagina]. It hurt."[5] );

- accused the Swans of inserting marbles and candles into the girls' vaginas ("Kathy put something in my potty and made me bleed"[6]; "Kathy put some

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[4]Washington v. Swan, 790 P.2d 610, 616 (Wash. 1990).

[5]Id. at 617.

[6]Id. at 616.

marbles in my bottom"[7]; "Bill and Kathy put a candle in my potty and played happy birthday."[8]);

- accused Kathy Swan of reciprocal cunnilingus ("we kiss Kathy's boobies and we lick her potty, and she does that to us, too."[9]);

- accused Bill Swan of fellatio ("My daddy puts his penis in my mouth and icky milk comes out"[10]; "[Uncle Bill] puts his peepee in my mouth and shakes it around and then he says 'Here is your birthday present' and something icky gets in my mouth."[11]).

If these accusations are true, then the defendants have indeed committed

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[7]Id. at 617.

[8]Id.

[9]Id.

[10]Id. at 616.

[11]Id. at 617.

heinous and reprehensible crimes. But judges, above all, must not let revulsion for the crime of abusing children undermine their vigilance to insure that crimes are fairly proved according to the rules of our Constitution.

In this case there is no real assurance that the children ever made the hearsay accusations attributed to them. The accusations of abuse were reported to the jury by two adult witnesses who worked at a day-care facility the girls attended. The girls, Beth Anne (the Swan's daughter) and her friend Rachel, were unavailable to testify because the trial judge determined, after a hearing, that they were incompetent as witnesses. At the hearing, Beth Anne simply refused to speak to the judge. Rachel spoke freely, saying she had been in the courtroom forty times when she had never been there before, claiming she recognized defense

counsel and had seen him four days before, neither being true, failing to recognize her father or the Swans although they were all present in the courtroom, and saying her dress was "blue, sort of, but it's pink," though the dress was only pink. The trial judge found that Rachel "did not understand the obligation to tell the truth on the witness stand and did not have sufficient memory to speak truly about past events."[12]

Beth Anne's hearsay accusations were elicited from her by a day-care worker, and Rachel's by the director of the day-care center on the following day. The day-care worker, Lisa Conradi, was on her second day of work and was thus a stranger to Beth Anne. She claimed she observed Beth Anne emerge from the bathroom with her dress up, and told her to keep her

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[12]Id. at 627.

private parts covered. She said she then instructed Beth Anne that no one should look at or touch her private parts, and that Beth Anne said in response "Mommy and Daddy do."[13] Conradi said that Beth Anne then described the alleged abuse, and said that Rachel was also involved. Conradi reported her account of Beth Anne's accusations to the director of the day-care center. The director interviewed Rachel the next day and elicited similar accusations from her.

Several circumstances surrounding the making of these accusations bear on their reliability. First, the evidence of these statements is entirely dependent on the credibility of the day-care worker and director, including the making of the statements, their wording and tone, the degree of leading and suggestion employed

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[13]Swan v. Peterson, 6 F.3d 1373, 1377 (9th Cir. 1993).

-- in short, the totality of the circumstances surrounding the supposed making of the statements. No tape recording was made of either girl's supposed statements, and no third party was present.

Second, the day-care staff had previously put pressure on Beth Anne to change her sexual behavior, which would naturally have made Beth Anne defensive when approached by a new member of the staff who scolded her about having her dress up and exposing her private parts. The director of the day-care center had previously been upset by Beth Anne's sexual behavior. The director testified that Beth Anne masturbated constantly and that the day-care staff "had to repeatedly tell Beth Anne to keep her hands out of her pants."[14] The director clearly

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[14] Id. at 621.

considered this masturbatory behavior inappropriate and in need of repression.

Third, Conradi, the day-care worker who reported Beth Anne's statements, was sensitive to the possibility of child abuse to a degree suggesting phobia. She claimed to have been abused as a child herself, claimed her own two children were victims of abuse, and asserted that child abuse is "everywhere".[15] In a post trial interview, Conradi noted that she had turned in over 20 cases of child abuse.[16]

Fourth, Conradi repeated her account of lurid child abuse to the day-care director before the director interviewed Rachel. The director, who was not experienced in neutral questioning, then

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[15]Citations to the Magistrate's Report and Recommendation are to Appendix A of Petitioners' brief. Magistrate's Report and Recommendation, Brief for Petitioners at App. A - 27-28.

[16]Swan v. Peterson, 6 F.3d 1373, 1384 (9th Cir. 1993).

interviewed Rachel, alone, in her office -- Rachel, whom the trial judge found to be suggestible and incompetent because she did not remember accurately and did not appreciate the obligation to tell the truth.[17]

Finally, the hearsay statements were not corroborated by any physical evidence. Indeed, to the extent possible given the nature of the accusations, they were contradicted. Had the accusations been true of insertion of penis, marbles, and candles into the vaginas of three-year-olds, allegedly resulting in bleeding, there would surely have been physical harm. Yet, there was none. As to Rachel, the Washington Supreme Court's opinion states flatly: "There was no medical

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[17]Moreover, the director wept while questioning Rachel but nonetheless continued the interview. Swan v. Peterson, 6 F.3d 1373, 1381 n.6 (9th Cir. 1993).

evidence to document Rachel's claims of abuse. A physician examined her on October 5, 1985 and found no signs of physical trauma."[18] As to Beth Anne, the Swan's family physician examined her and found "no evidence of physical injury to her genitalia."[19] The doctor failed to note whether Beth Anne's hymen was intact, but an examination subsequent to trial revealed that Beth Anne's hymen is intact.[20]

The hearsay accusations were admitted into evidence pursuant to Washington's child victim hearsay statute, which provides that hearsay statements of a child which are not otherwise admissible under a traditional hearsay exception

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[18]Id. at 624.

[19]Swan v. Peterson, 6 F.3d 1373,1385 (9th Cir. 1993).

[20]Magistrate's Report and Recommendation, Brief for Petitioners at App. A - 30-31.

shall be admitted if the time, content and circumstances of the statement provide sufficient indicia of reliability, and the child is unavailable as a witness, and there is corroborative evidence of the act. Although the trial judge did not make the specified findings required by the Washington statute, the hearsay accusations were not only admitted, but allowed to constitute the sole direct proof of both the corpus delicti and the defendants' criminal responsibility.

The Washington Court of Appeals reversed the defendants' convictions and ordered a new trial because, it found, the accusations were not sufficiently corroborated to meet the standards of the Washington statute.[21] The Supreme Court of Washington then reversed the Court of

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[21]The Court of Appeals' opinion is unpublished. It is described by the Washington Supreme Court, 790 P.2d 610, 614.

Appeals and reinstated the Swans' convictions, based on its conclusion that the accusations of the two girls corroborated each other sufficiently to satisfy the corroboration requirement of Washington's statute.

On habeas corpus to the United States District Court, the Swans claimed that they had been denied their constitutional right to confront their accusers. The district court held that the credibility of the reporting witness and the existence of evidence contradicting the hearsay accusations were constitutionally irrelevant for determining the reliability of the accusations, and that Rachel's inability to tell the truth or accurately remember the past did not undermine the reliability of her hearsay accusations. The Ninth Circuit affirmed, specifically declining to consider whether a defendant could constitutionally be convicted on

hearsay alone. The Swans have petitioned this court for a writ of certiorari.

## REASONS FOR GRANTING THE WRIT OF CERTIORARI

### I. EVIDENCE CONTRADICTING HEARSAY ACCUSATIONS SHOULD BE CONSIDERED CONSTITUTIONALLY RELEVANT TO THE NEED FOR CONFRONTATION.

In assessing the reliability of the hearsay accusations, the Ninth Circuit felt compelled by this Court's decision in Idaho v. Wright[22] to ignore all evidence contradicting the hearsay accusations.[23] This is a gross misreading of Wright and a perversion of its purpose. Notwithstanding Wright's mandate to carefully examine the reliability of non-traditional hearsay accusations, the Ninth Circuit treated the evidence of unreliability as constitutionally

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[22]497 U.S. 805 (1990).

[23]"[C]an arguably noncorroborating evidence be used to demonstrate the unreliability of a hearsay statement? Wright's caution against reference to other evidence at trial suggests not." Swan v. Peterson, 6 F.3d 1373, 1381 (9th Cir. 1993).

irrelevant: the fact that medical evidence negates much of the physical experience which the statements describe; the fact that Conradi approached Beth Anne and initiated the sequence that resulted in the accusations by scolding the child for having her dress up and lecturing her about how no one should see or touch her private parts; the fact that Rachel's statements were in response to questions by the director in an interview held for the purpose of asking about the alleged abuse by the Swans (quite the opposite of "spontaneous"), and that the director had conferred with Conradi and thus had in mind not only the substance but the phrasing of Beth Anne's alleged statements. The Ninth Circuit saw no constitutional necessity to consider the obvious alternative explanation for the supposed precocious knowledge reflected in the reported statements, namely that the

described sexual events sprang from the adult fears, imagination, or experience of Lisa Conradi, who elicited them from Beth Anne and then reported them to the director, who then in turn "confirmed" them in her interview with suggestible Rachel.

The Ninth Circuit's refusal to consider the contradicting medical evidence when determining the reliability of the hearsay statements denied the defendants the protection due them. Wright holds that hearsay which lacks sufficient foundational guarantees of trustworthiness cannot be boot-strapped into evidence by corroborating evidence.[24] This holding is the defendant's protection. Reliability is the ultimate constitutional key. Although the trial

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[24]See also United States v. Accetturo, 966 F.2d 631, 634 (11th Cir. 1992); Ring v. Erickson, 983 F.2d 818, 821 (8th Cir. 1993).

judge may not consider other corroborating evidence to boost the level of reliability over the threshold of proof, Wright should be read to require the judge to consider noncorroborating, contradictory evidence that could prove the hearsay to be unreliable. If the court ignores noncorroborating evidence, it might admit inherently unreliable testimony, thereby defeating the main thrust of Wright. Moreover, Wright sets a standard for the admission of hearsay specifically requiring that it "be so trustworthy that adversarial testing would add little to [its] reliability." Wright, 497 U.S. at 820; see also White v. Illinois, 112 S. Ct. 736, 743 (1992). The existence of medical evidence totally inconsistent with the children's alleged hearsay statements demonstrates a clear need for adversarial testing through cross-examination, and, in the absence of cross-examination, thus

renders the hearsay statements constitutionally incompetent.

This Court should grant certiorari because the Ninth Circuit's result allows a defendant to be convicted of a crime on the basis of hearsay shown to be unreliable by other evidence, a result which diminishes the constitutional protection of the Confrontation Clause to the vanishing point.

## II. THIS COURT HAS NOT CONSIDERED THE CONSTITUTIONAL IMPLICATIONS OF ADMITTING THE HEARSAY STATEMENTS OF A CHILD FOUND INCOMPETENT TO TESTIFY BECAUSE SHE DOES NOT UNDERSTAND THE OBLIGATION TO TELL THE TRUTH AND DOES NOT HAVE SUFFICIENT MEMORY TO SPEAK TRULY ABOUT PAST EVENTS.

In Idaho v. Wright, this Court recognized that if a child is too scared to speak in court, her incompetence for that reason does not necessarily mean that statements she made in earlier unpressured circumstances are unreliable. But when,

as here, a child's incompetence stems not from fear but from insufficient capacity for perception, memory, and truth telling, the child's statements -- past and present -- are presumptively unreliable.[25] Absent a showing that the child was substantively competent at the time the hearsay statements were made, such statements are inherently unreliable and their admission should be barred by the Confrontation Clause.

In this case, the trial judge conducted a full competency hearing and found that Rachel "did not understand the obligation to tell the truth" and "did not

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[25]See State v. Paster, 524 A.2d 587, 590 (R.I. 1987) ("When a trial justice has ruled a witness incompetent to testify because the justice is not convinced that the witness is capable of relating a capacity to observe, to recollect, to communicate, or to appreciate truthfulness, the justice has already made the determination that the witness's assertions are unreliable."); See also Hutchcraft v. Roberts, 809 F. Supp. 846, 851 (Kan. 1992).

have a sufficient memory to speak truly about past events."[26] Nonetheless this three year old child's hearsay statements were accepted by the courts below as crucial evidence to convict.

The competence of a declarant is the bedrock foundation for the reliability of a declarant's statement. The reliability of a statement cannot exceed the reliability of the declarant. The circumstances surrounding the making of a statement can sometimes give clues to the reliability of the declarant's statement, but if the declarant is known to be incompetent, then no amount of surrounding circumstance makes a difference. The accusation of a lunatic is, constitutionally speaking, unreliable as a basis for a criminal conviction, regardless of whether the accusation was

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[26]Washington v. Swan, 790 P.2d 610, 627 (Wash. 1990).

spontaneous or excited. Approving the admission of Rachel's hearsay statements is akin to approving the hearsay declaration of a blind person stating what he saw, or of an amnesiac stating what she remembered.

The Court should grant certiorari in order to clarify the important differences in principle between hearsay statements made by individuals incapable of speaking the truth or accurately remembering the past and those made by individuals found incompetent simply because they cannot communicate to the jury.

## III. THE CONSTITUTIONAL TEST FOR ADMITTING HEARSAY ACCUSATIONS SHOULD BE UNDERSTOOD TO REQUIRE TRIAL JUDGES TO ASSESS THE CREDIBILITY OF THE PERSONS ELICITING AND REPORTING THE HEARSAY STATEMENTS.

In child abuse cases, where statements from children are often elicited by untrained individuals who may

be predisposed to find abuse[27], the reliability of these statements cannot accurately be determined without also considering the credibility of the questioner.

Where hearsay is concerned, judges should understand that they are charged directly with the duty of assessing the statement's reliability to see if its presumed unreliability is overcome. This requires the judge to determine outright that the hearsay statement was actually made, it being logically impossible to assess the reliability of a fictitious statement. The credibility of the reporter thus becomes a constituent part of the reliability of the hearsay. If the hearsay statements were tape recorded,

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[27]Indeed, several studies have shown that 40% to 80% of sex abuse allegations are false. Slicker, Child Sex Abuse: The Innocent Accused, 91 Case & Comment 12, November/December 1986.

judges would easily recognize their obligation to judge the reliability of the tape recorder as part of the foundation. Likewise, judges must assess the reliability of human "recorders" who report hearsay accusations as part of the foundation.[28]

Wright instructs trial judges to assess "the totality of the circumstances" that surround the making of a hearsay statement. Idaho v. Wright, 497 U.S. 805, 820 (1990). As to this "totality" the judge is an outright fact finder for purposes of deciding the admissibility of

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[28]This Court in Wright recognized that the credibility of a reporter is at issue by identifying the presence or absence of a tape recording of a non-traditional hearsay statement as a relevant consideration in determining its admissibility. Idaho v. Wright, 497 U.S. 805, 818-19 (1990). The existence of a tape recording of the statement eliminates questions, pertinent to admissibility, about the credibility of the reporter. See McCafferty v. South Dakota State Penitentiary, 944 F.2d 445, 452 (8th Cir. 1991).

the evidence and not merely an appraiser of whether a reasonable juror could find that the foundational requirements for admissibility are met. In this factfinding role, it is a crucial issue, deeply confusing to judges, whether they should assess the credibility of the foundation-fact witness. The approach of the Ninth Circuit sees no judicial role in evaluating the credibility of the hearsay reporter. Other courts, however, recognize that the trial judge should assess the credibility of the reporter at the foundational level. See e.g., United States v. Williams, 809 F.2d 75, 89 (1st Cir. 1986) ("Evaluation of [the witnesses'] credibility ... is within the province of the trial court for purposes of [determining whether a conspiracy exists as a foundational aspect of admitting a coconspirator's statement].")

The Ninth Circuit failed to

appreciate that the reliability of hearsay statements in child abuse cases necessarily depends on the reliability of the hearsay reporter.[29] Judges who do not understand this are confused about their function, thinking simplistically that all matters of witness credibility are for the jury. This is fundamentally wrong. It is at odds with the basic duty of judges to test evidentiary foundations. Credibility is for the jury on ultimate issues. Credibility is for the judge on questions of foundation. Cf. Daubert v. Richardson, 113 S. Ct. 2786 (1993). The Court should grant certiorari to clarify the basic

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[29]See, Ceci & Bruck, Suggestibility of the Child Witness: A Historical Review and Synthesis, 113 Psychological Bulletin No. 3, page 403, 420-22 (1993) (Analyzing studies suggesting that the prior knowledge of interviewers influences their questioning and affects children's responses. Children respond to what they think the interviewer wants them to say, and once they adopt an inaccurate story, will maintain this story under later questioning).

function of judges in assessing the foundation and sufficiency of evidence.

## IV. THIS CASE PRESENTS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW CONCERNING WHETHER A CRIMINAL DEFENDANT CAN BE CONVICTED ON THE BASIS OF HEARSAY ALONE.

This case presents the unresolved and fundamentally important question of whether the Confrontation Clause bars the conviction of an individual solely on the basis of hearsay evidence.[30] The magistrate summed up the evidence in this case as follows: "As physical or other corroborating evidence of abuse was equivocal or absent, the State's case

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[30]This issue was originally raised in an amicus brief I filed in the Ninth Circuit. The Ninth Circuit concluded that the Swans waived this argument by failing to reference it in their brief. However, the Swans ceded ten minutes of their argument time to me to address this issue on their behalf. I respectfully request that the Court not allow this technical deficiency to jeopardize the constitutional rights of the Swans. The Swans have adopted this argument on appeal to this Court. See Brief for Petitioners at 24 n.16.

against the Swans was built entirely on the hearsay statements."[31] Hearsay alone should be considered inadequate to sustain a criminal conviction beyond a reasonable doubt because, without either cross-examination or corroboration, there necessarily remains the reasonable doubt that the declarant misspoke, misstated, misremembered, or misperceived.

There is no reason to assume that once a hearsay accusation is admitted it must be deemed sufficient to convict, even if crediting the hearsay would cover all of the elements of the charged offense. Hearsay is admitted, whether pursuant to traditional or non-traditional exceptions, because the trier of fact is better able to determine the truth with than without it. Kaplow, Note, The Theoretical

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[31]Magistrate's report and recommendation, Brief for Petitioner at App. A - 13. See also, Swan v. Peterson, 6 F.3d 1373, 1377 (9th Cir. 1993).

Foundation of the Hearsay Rules, 93 Harv. L. Rev. 1786 (1980). But this does not mean that the hearsay is as solid a basis for conviction as cross-examined evidence. The hearsay, even after admission, still carries the deficiency that it has not been tested by cross-examination. Wigmore's oft-quoted assertion that hearsay is sometimes so trustworthy as to render cross-examination superfluous is actually quite silly and should not be seen as a description of actual trial realities. No one really believes, for example, that excited utterances, contemporaneous statements, or dying declarations are ipso facto so trustworthy that "cross examination of the declarant would be an act of supererogation."[32] If

[32]See Hutchins & Slesinger, Some Observations on the Law of Evidence, 28 Colum. L. Rev. 432 (1928); Goldman, Distorted Vision: Spontaneous Exclamations as a "Firmly Rooted" Exception to the Hearsay Rule, 23 Loy. L. Rev. 453 (1990).

hearsay is the sole evidence of guilt, then the essential process value of the Confrontation Clause, namely allowing the defendant to test the case against him, is defeated.

Confrontation should be conceived as insuring that the defendant has the opportunity to test the strength of the case against him taken as a whole. Such an approach would recognize on one hand that hearsay is often strong enough evidence to justify its admissibility, and on the other hand, that it is inherently deficient as a sole basis for reaching a conclusion beyond a reasonable doubt. This approach would require a threshold foundation of reliability to justify admission of hearsay, just as Justice O'Connor articulates in Wright, but would also require that if hearsay is admitted, it must be corroborated to be deemed sufficient to convict. See Wright, 497

U.S. at 834 (Kennedy, J. dissenting) (recognizing that corroboration is essential to a defendant's right to test the case against him).

This Court has already recognized a category of statements which are admissible but nonetheless deficient to prove what they assert because, without more, doubt remains as to the statement's reliability. Confessions, for example, cannot provide the sole basis for conviction. Opper v. United States, 348 U.S. 84, 91 (1954). Before a jury can decide the guilt or innocence of a defendant, the government must "introduce substantial independent evidence which would tend to establish the trustworthiness of the [confession]." Id. at 93; see also United States v. Leavitt, 608 F.2d 1290, 1292 (9th Cir. 1979 (defendant's admission cannot constitute the sole proof of corpus delicti).

Furthermore, the requirement that an anonymous tip be corroborated to establish probable cause involves a similar relationship between admissibility and sufficiency at a different level of evidentiary reliability and certainty of proof. Illinois v. Gates, 462 U.S. 213 (1983).

The Sixth Circuit has specifically recognized that hearsay alone cannot establish guilt beyond a reasonable doubt:

> [W]hen [hearsay] is the only source of support for the central allegations of the charge . . . we do not believe that a substantial factual basis as to each element of the crime providing support for a conclusion of guilt beyond a reasonable doubt has been offered by the Government.

United States v. Orrico, 599 F.2d 113, 118 (6th Cir. 1979). While Judge Easterbrook, writing for the Seventh Circuit *en banc*, recognized the sufficiency question as

open,[33] at least three Seventh Circuit Judges concluded that hearsay alone is insufficient to support a conviction. United States v. Ortiz, 907 F.2d 629, 636 (7th Cir. 1990) (opinion of Chief Judge Bauer).

The Swans have been convicted solely on the basis of extremely thin hearsay, unsworn, unrecorded, uncrossexamined, uncorroborated, unconfronted, uttered by incompetent declarants, and reported by biased witnesses. The Court should grant certiorari and address whether such hearsay evidence can be the sole basis for reaching a conclusion beyond a reasonable doubt.

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[33] "If evidence is both admissible and relevant, there is of course a third question: whether it is sufficient to support a verdict. Nothing we say in this opinion addresses the question whether hearsay alone is sufficient to support a verdict of guilt." United States v. Ortiz, 907 F.2d 629, 632 (7th Cir. 1990).

## CONCLUSION

For the foregoing reasons, the Court should grant the Swans' petition for certiorari.

Respectfully submitted,

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[34]Thanks to Steven Glaser and David Becker, students at Harvard Law School, for assistance in preparing this amicus petition.

Supreme Court, U.S.
FILED
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NO. 93-1633

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

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WILLIAM O. SWAN and
KATHLEEN R. SWAN,

*Petitioners*,

v.

KURT S. PETERSON, et al.,

*Respondents*.

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On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

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## BRIEF IN OPPOSITION

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# QUESTION PRESENTED

Whether the courts below correctly applied *Idaho v. Wright*, 497 U.S. 805 (1990) in ruling that Petitioners' Sixth Amendment right to confrontation was not violated by the trial court's admitting into evidence the hearsay statements of two child sexual abuse victims.

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28 U.S.C § 2254 . . . . . 8

28 U.S.C. § 2254(d) . . . . . 13, 14

RCW 9A.44.120 . . . . . 7, 16

**Other Authorities**

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Supreme Court Rule 10.1 . . . . . 18

Supreme Court Rule 35.3 . . . . . 1

NO. 93-1633

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

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WILLIAM O. SWAN and
KATHLEEN R. SWAN,

*Petitioners*,

v.

KURT S. PETERSON, et al.,

*Respondents*.

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On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

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## BRIEF IN OPPOSITION

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Respondents Kurt S. Peterson, Alice Payne,[1] and Chase Riveland, by and through Christine O. Gregoire, Attorney General for the State of Washington, and Paul D. Weisser, Assistant Attorney General, respectfully pray for an order denying a writ of certiorari to review the judgment of the United

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[1]Alice Payne has succeeded Eldon Vail as the Superintendent of the Washington Corrections Center for Women and is substituted as Respondent in this Court pursuant to Supreme Court Rule 35.3.

States Court of Appeals for the Ninth Circuit.

## I. STATEMENT OF THE CASE

### A. Facts of the Case

The Petitioners' (hereinafter, the Swans) petition in this Court relies in large part upon their slanted account of the facts of their case, as though no court had previously reviewed and rejected that version of the facts. The Washington Supreme Court authoritatively summarized the facts of the Swans' crimes, their victims' out-of-court statements, and the 1986 trial proceedings as follows:

> On October 2, 1985, 3-year-old B.A. walked out of a day-care center bathroom with her dress tucked in her tights. The center's teacher, Lisa Conradi, untucked the dress and told B.A. to keep her private parts covered. When B.A. appeared confused, Conradi explained that "private parts" means the areas covered by her bathing suit. B.A. pointed to her chest and crotch area. Conradi then added that no one should look at or touch B.A.'s private parts, whereupon B.A. said, "Uh-huh, Mommy and Daddy do." When asked "What do Mommy and Daddy do?", B.A. replied, "Mommy spits on me." Conradi asked where, and B.A. pointed to her crotch. At this point, Conradi gave B.A. a book and took the rest of the children downstairs. When Conradi returned, she asked B.A. if her parents did anything else to her private parts. B.A. said she spits on Mommy in her private parts and that Daddy "puts his potty in me and it hurts real bad." Conradi explained that a man's potty was a penis. The two then walked around the room. B.A. played peekaboo from behind a door with Conradi several times, and said, "My daddy plays peekaboo with me."

She also said, "My daddy puts his penis in my mouth and icky milk comes out." When asked who else played this game, B.A. said Josh does. B.A. also said they played the games in the bedroom with their clothes off.

When Cindy Bratvold, the day-care owner, returned to the center a short while later, Conradi told her about B.A.'s statements. Bratvold then called Child Protective Services (CPS). After calling CPS, Bratvold asked B.A. whether her close friend R.T., who attended the same day-care center, played games with B.A.'s parents. B.A. said "yes".

Two CPS caseworkers interviewed B.A. that day. B.A. would not answer questions they posed, but when Conradi asked in their presence if her mother spit on her or put her mouth on B.A.'s private parts, the child nodded and said "yes". The interview ended when the defendant Kathleen Swan came to take her daughter B.A. home. The CPS caseworkers then decided to interview R.T. and B.A. on October 4, when both girls were scheduled to be at the day-care center.

R.T. came to the center the following day, October 3, but B.A. did not. Bratvold took R.T. upstairs and began to talk to her. Bratvold started by asking R.T. if she liked certain people, including "B.A.'s mommy". R.T. liked the people listed and "kind of" liked Kathy Swan. When asked what she meant, R.T. said "she makes us play funny games." These games included exercise games and ring around the rosy in the nude and falling on the bed. "Then we kiss Kathy's boobies and we lick her potty, and she does that to us, too." R.T. also said that "Kathy puts--one time Kathy put something in my potty and made me bleed, and she cleaned it up and told me not to say anything."

R.T. then said she played games with "Uncle Bill" (the defendant William Swan). She said that Uncle Bill's favorite game was the happy birthday game. "And that's where he puts his peepee in my mouth and shakes it around, and then he says, 'Here is your birthday present,' and something icky gets in my mouth." R.T. also said that the Swans put candles and marbles in her "peepee". She added that another man, John or Josh, played the games.

The next day, a CPS caseworker came to the Bratvold day-care center to talk to the two girls. An initial attempt to interview them together proved unsuccessful, so the caseworker talked to the girls separately in Bratvold's presence. R.T. told the caseworker that she played "with a game of marbles" at the Swans' home. She then added, "Bill plays without his clothes on. Bill touches my potty with his fingers." When asked what a "potty" was, R.T. said it was a "peepee hole". R.T. then said, "Kathy put some marbles in my bottom." When asked where her bottom was she said "peepee hole" and pointed to the vaginal area of an anatomically correct doll that the caseworker had brought. R.T. then added, "I am afraid . . . Kathy touches my potty. Blood was on my bottom. Kathy put something in my peepee hole. It hurt." She said there was blood "down there" and pointed to her crotch. She also said that she touched Kathy's "potty and boobies" and put her mouth on them. R.T. then said that B.A. was present, and added, "I am too afraid for it. I just hurt, she poked a marble in it, she just put a marble in it, in my potty." What happened? "Kathy fixed it."

Bratvold then asked R.T. about the happy birthday games. R.T. said, "Bill and Kathy put a candle in my potty and played happy birthday. Bill put marbles in my potty to make it better. Stuff comes out of his peepee." When asked if the "stuff" was like milk, water, or blood, R.T. replied, "Like milk." She added that "Bill gives

me a happy birthday present, gives me one in my bottom." When asked if she liked Bill, R.T. said, "He is mean, I don't like him, he hurts me, he puts his peepee - - ." R.T. pointed to the vagina on the doll when asked where Bill puts his peepee on her. "It hurt." R.T. added that B.A. played the marble and hap`y birthday games with the defendants.

The CPS caseworker then interviewed B.A. When asked if Mommy spits on her potty, B.A. replied, "Yes". When asked where Daddy puts his peepee, she said, "On my potty." When asked how it felt, she answered, "It hurts". B.A. said R.T. was present when these things happened, and she said that she played happy birthday and marble games with her mother and father, but she would not describe the games.

After the interviews, the police were called and the children were taken into protective custody. B.A. was placed in a foster home while R.T. was returned to her parents and continued to attend Bratvold's day-care center. Two months later, R.T. told Bratvold she wanted to tell her something. "See my finger? I have a burn. I had a burn. . . . When Bill and Kathy lit the candle in my potty and I tried to grab it out, my finger got burned, and then I bumped my head on the counter when they made me lay on the counter." On October 17, 1985, after the alleged abuse came to light, R.T. spontaneously told her father that "Bill and Kathy are bad" because they put marbles in her bottom.

B.A.'s foster mother testified that while drying B.A. off after a bath, B.A. told her that her mommy and daddy put marbles in her potty. The foster mother asked her son for some toy marbles and asked B.A. if they were the type of marbles Daddy put in her potty. B.A. laughed and said no. When asked what kind of marbles Daddy used, B.A. pointed to her crotch. The foster mother then asked if the marbles were on

> Daddy's potty, and B.A. pointed to her crotch and said, "Yes, and a snake full of marbles." The foster mother also testified that B.A. had mentioned marbles on other occasions, and oncehad said that her daddy put marbles and other things inside her potty and then started to cry as she said this. The foster mother testified further that B.A. once brought up the subject of birthday candles in her potty.
>
> Having outlined the parallel disclosures made by the children, we now turn to an analysis thereof to determine whether, as the State argues, these disclosures are corroborative evidence of the alleged abuse.
>
> B.A. and R.T. did not have contact with each other on October 2 or 3, the days that they talked to the day-care workers. On October 4 they sat together but briefly before their separate interviews by the CPS caseworker.
>
> Summarizing the similarities between the statements of these two 3-year-old children, we find the following. B.A. said that her daddy put "his potty in me", and R.T. said that he put his "peepee" in her. B.A. said that Daddy put his penis in her mouth and icky milk came out; R.T. said Uncle Bill put his potty in her mouth and something icky, like milk, came out. B.A. said that she and her parents played games in the bedroom without clothes on; R.T. said that they played ring around the rosy in the nude, that Uncle Bill played without his clothes on, and that they fell on the bed after their games. B.A. said Josh also played the games, while R.T. said John or Josh played. B.A. said that her parents put marbles and birthday candles in her potty; R.T. said that the Swans put candles and marbles in her peepee and her bottom.

*State v. Swan*, 114 Wn.2d 613, 624-28, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991). *See also* Pet. App. A-5 -

A-9

## B. Procedural History of Case

At the Swans' 1986 trial, whenever one of the child victim's hearsay statements was about to be elicited from a witness, the trial court excused the jury and voir dire examination was conducted to determine the reliability of the statements. The trial court found each of the girls' hearsay statements to be reliable and admitted them into evidence. The Swans were convicted of two counts of first degree statutory rape and were each sentenced to 50 month terms of imprisonment.[2] The Washington Court of Appeals reversed their convictions, holding that the hearsay statements of the three-year-old victims were reliable under the Confrontation Clause but that there was insufficient corroboration of sexual abuse as to one of the victims, a state law requirement for admissibility of child hearsay statements.[3]

However, the Washington Supreme Court unanimously reversed the Court of Appeals decision and reinstated the Swans' convictions. *State v. Swan*, 114 Wn.2d 613, 790 P.2d 610 (1990). The Washington Supreme Court thoroughly reviewed

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[2]The Swans have completely served their sentences.

[3]Washington State law requires that trial courts, before admitting hearsay statements made by child sexual crime victims, make separate determinations that the hearsay statement is reliable *and* is corroborated by independent evidence of the crime. *See* RCW 9A.44.120

the time, content, and circumstances of the child victims' statements and found them to be reliable under the ConfrontationClause (as had the Washington Court of Appeals). The state Supreme Court specifically found that: (1) neither B.A. nor R.T. had a motive to lie; (2) the girls had reputations for truthfulness; (3) the girls used specific terms and age-appropriate language in their statements; (4) the girls' responses were voluntary and spontaneous either as responses to open-ended questions or no questions at all; (5) there existed a relationship of trust between the girls and the adult witnesses; (6) there was no possibility of collaboration between B.A. and R.T.; (7) the girls gave similar accounts of sexual abuse to more than one person; (8) cross-examination of the girls would not show a lack of knowledge; and (9) no circumstances were present to suggest that the girls misrepresented either defendant's involvement. *Id.* at 648-52. The Court therefore concluded that the statements were admissible under the federal Constitution and state law. *Id.* This Court denied the Swans' petition for writ of certiorari. *Swan v. Washington*, 498 U.S. 1046 (1991).

In July 1990, the Swans filed identical petitions (later consolidated) for writ of habeas corpus under 28 U.S.C § 2254, arguing that the admission of B.A. and R.T.'s hearsay statements violated their rights under the Confrontation Clause. The district court conducted an independent review of the state court record

and reached conclusions similar to the state courts' regarding the reliability of the girl's statements. *See* Pet. App. A-10 - A-27. The court noted that each of B.A. and R.T.'s initial statements, with no sign of collaboration between the girls, contained "a spontaneous description of oral intercourse which was so specific, and showed such inappropriate and precocious knowledge, that it would be difficult to see this knowledge as anything other than the result of personal experience." *Id.* at A-17. The court also observed that the statements were made spontaneously and without motive to fabricate, that neither of the girls was prone to lying or storytelling, and that the allegations did not grow over time as a result of repeated questioning. *Id.* at A-18 - A-25. The district court denied the Swan's petition.

On appeal, the Ninth Circuit affirmed the district court's findings and conclusions. The Ninth Circuit held that B.A. and R.T.'s statements were admissible at trial and caused no Confrontation Clause violation because the statements were clearly reliable, citing *Idaho v. Wright*, 497 U.S. 805 (1990). *Swan v. Peterson*, 6 F.3d 1373, 1379-83 (9th Cir. 1993). Thus, every judge, both state and federal, to have reviewed the hearsay statements of B.A. and R.T. has found them to be reliable for purposes of the Confrontation Clause.

## II. REASONS FOR DENYING THE WRIT

The Swans' case does not present a significant issue of law. Rather, the Swans are simply dissatisfied with the outcome of the Ninth Circuit's application of *Idaho v. Wright*, 497 U.S. 805 (1990) to their case and are merely asking this Court to conduct yet another review of the facts of their particular case. This does not raise a substantial federal question. Moreover, the courts below and the state courts correctly applied the proper Confrontation Clause analysis to the facts of their case. Therefore, the Swans' petition for a writ of certiorari should be denied.

### A. The Swans' Case Presents No Conflicts With This Court's Decisions Nor Any Intercircuit Conflict.

#### 1. The Ninth Circuit's Decision Is Consistent With This Court's Confrontation Clause Jurisprudence.

A literal reading of the Sixth Amendment's Confrontation Clause would effectively bar the use of all out-of-court statements and other hearsay evidence at criminal trials, "a result long rejected as unintended and too extreme." *Ohio v. Roberts*, 448 U.S. 56, 63 (1980). Although the Confrontation Clause and the rules governing hearsay evidence both stem from the same roots and are designed to protect similar values, they are not equivalent. *Idaho v. Wright*, 497 U.S. 805, 813-14 (1990); *Dutton v. Evans*, 400 U.S. 74, 86 (1970) (plurality

opinion); *California v. Green*, 399 U.S. 149, 155 (1970). The Confrontation Clause may bar the admission of some evidence that would be otherwise admissible under an exception to the hearsay rule; conversely, a violation of the hearsay rule is not necessarily a violation of the Confrontation Clause. *Wright, supra*; *Green*, 399 U.S. at 155-56.

Under this Court's test, the Confrontation Clause will prohibit the use of hearsay evidence unless it bears adequate "indicia of reliability." *Roberts*, 448 U.S. at 65-66. In cases where the out-of-court statement falls within a firmly-rooted hearsay exception, reliability is inferred and the Confrontation Clause is satisfied. *White v. Illinois*, ___ U.S. ___, 112 S. Ct. 736, 743 (1992); *Roberts*, 448 U.S. at 66. In other cases, the evidence is inadmissible unless the State demonstrates that the evidence carries "particularized guarantees of trustworthiness" that render it reliable. *Roberts, supra*.[4]

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[4]Dicta from *Ohio v. Roberts* would appear to suggest that, in addition to establishing the reliability of an out-of-court statement, the Confrontation Clause also requires that in all cases the State either produce the hearsay declarant at trial or to demonstrate that the declarant is unavailable. *See Roberts*, 448 U.S. at 65 ("In the usual case, . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant . . . ); *id.* at 66 ("the Confrontation clause normally requires a showing that [the hearsay declarant] is unavailable"). In more recent cases, however, this Court has clarified that aspect of *Roberts* and has held that "unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding." *White v. Illinois*, ___ U.S. ___, 112 S. Ct. 736, 741 (1992); *see also United States v. Inadi*, 475 U.S. 387 (1986). Thus, aside from cases involving prior

The test of whether a hearsay statement is reliable is not whether it satisfies a prescribed list of trustworthiness factors. Instead, the required "particularized guarantees of trustworthiness" involve an assessment of a variety of factors and must be drawn from "the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief." *Idaho v. Wright*, 497 U.S. at 821. No mechanical test is appropriate, and courts are given "considerable leeway" in their review of appropriate factors bearing on the reliability of hearsay evidence. *Id.* at 822.

Both the district court and the Ninth Circuit thoroughly and carefully analyzed the admission of B.A. and R.T.'s out-of-court statements in light of *Idaho v. Wright* and *Ohio v. Roberts*. *See Swan v. Peterson*, 6 F.3d at 1379-83; Pet. App. A-10 - A-27. The Ninth Circuit reviewed and agreed with the state courts' and the district court's specific findings with regard to the reliability of B.A. and R.T.'s statements: (1) neither girl had a motive or a tendency to lie; (2) both girls used age-appropriate language to describe specific sexual acts; (3) the statements were spontaneous responses to open-ended questions or to no questions at all; and (4) the disclosures were made to adults with whom the girls had a relationship of trust. *Swan*, 6 F.3d at 1380-81. The

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testimony, the Confrontation Clause imposes no "unavailability" requirement.

Ninth Circuit observed that the first three of these reliability factors were of a type explicitly approved by this Court in *Wright* and that the fourth factor was consistent with the wide latitude that trial courts must have in making reliability determinations. *Id.* at 1380.

The Ninth Circuit's opinion is entirely in accord with this Court's Confrontation Clause jurisprudence that reliable hearsay evidence is admissible. The Swans cannot point to any conflict or controversy within the circuit courts over the proper analysis under the Sixth Amendment or the application of *Wright*. Thus, their case is an inappropriate vehicle for this Court to revisit the settled Confrontation Clause test for the admissibility of hearsay testimony.

### 2. The Swans' Petition Ignores and Mischaracterizes the Lower Courts' Findings and Conclusions.

The Swans' Confrontation Clause claim is ultimately governed by the specific facts as found by the state courts and the district court. In federal habeas corpus proceedings, a state court's findings on the merits of a factual issue are entitled to a presumption of correctness and may be set aside only if the federal court concludes that the findings are not "fairly supported by the record." *Sumner v. Mata*, 449 U.S. 539, 551 (1981); 28 U.S.C. § 2254(d). The presumption applies equally to the factual findings of a state's trial courts and its appellate courts.

*Mata*, 449 U.S. at 545-47. While a state court's conclusions regarding mixed questions of law and fact are not governed by § 2254(d), the court's findings of fact underlying its ultimate conclusion of a legal or mixed question *are* governed by the statutory presumption of correctness. *Miller v. Fenton*, 474 U.S. 104, 112 (1985); *Marshall v. Lonberger*, 459 U.S. 422, 431-32 (1983). "[A]n issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question." *Miller*, 474 U.S. at 113.

A federal district court's findings of historical fact are also entitled to great deference and may be set aside only if clearly erroneous. Fed. R. Civ. P. 52(a). Although special deference is accorded to a district court's credibility determinations, the "clearly erroneous" standard applies to all findings by a district court, whether they rest on credibility determinations or whether they are based on physical or documentary evidence or inferences from other facts. *Anderson v. Bessemer City*, 470 U.S. 564, 574-75 (1985). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson, supra; see also Amadeo v. Zant*, 486 U.S. 214, 225-26 (1988).

The Swans do not seriously challenge the reliability factors as found by the trial court, the Washington Supreme Court, and the district court and that were approved by the Ninth

Circuit. That is, they have not suggested in what particular way the state courts' findings are not entitled to the presumption of correctness or the district court's independent findings are clearly erroneous. Rather, they challenge the legal weight to be assigned to them or argue that the presence of other factors undercut the lower federal courts' and state courts' unanimous conclusion that B.A. and R.T.'s statements were admissible. They base their attack on a fundamentally flawed version of the decision in their case.

For example, the Swans allege that the Ninth Circuit and the other courts concluded that B.A. and R.T.'s statements bore particularized guarantees of trustworthiness "based *solely* on upon [sic] their consistency with prior statements" or "based *solely* upon the consistency of these statements with other statements." *See* Petition, Questions I and II (emphasis added). Actually, the Ninth Circuit eschewed any "consistency" or cross-corroboration factors from its analysis for the statements' reliability under *Wright*. *Swan*, 6 F.3d at 1380.

> Nevertheless, we do not conclude that the bootstrapping errors of the state courts and the district court tainted their reliability determinations. Neither the state courts nor the district courts indicated that cross-corroboration was a primary reason for finding the statements reliable; indeed, the district court found most significant the knowledge of sexual acts unexpected of children that age.

*Id.* at 1380-81. Thus, the admissibility of the victims out-of-court statements was governed by factors unrelated to their consistency.[5]

The Swans also allege that R.T.'s statements also did not possess the requisite guarantees of trustworthiness because she was found incompetent to testify based upon her "inability to speak truthfully". Petition, Question IV.[6] However, R.T.'s incompetency was actually based on her inability to communicate in a courtroom setting, not on a supposed inability to tell the truth at the time she made her out-of-court statements. As this Court held in *Wright*, "the Confrontation Clause does not erect a *per se* rule barring admission of prior statements of a declarant who is unable to communicate to the jury at the time of trial." *Wright*, 497 U.S. at 825. In the Swans' case, "[t]he trial court recognized the distinction between R.T.'s ability to testify in a courtroom setting and to tell the truth at the time of the

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[5]The trial court and the Washington Supreme Court were required by state law to make separate determinations of reliability *and* corroboration regarding the admissibility of a hearsay statement made by a child sexual abuse victim who is unavailable to testify. *See* RCW 9A.44.120. Therefore, the state court's findings on the two different subjects should not be blended in such a way (as the Swans would have it) as to make it appear that the courts boot-strapped the statements' consistency (a relevant corroboration factor) into the reliability analysis. However, it is axiomatic that, had the girls' statements been in any way *inconsistent*, the Swans would seize upon the fact and argue that it renders the statements unreliable.

[6]B.A. was also found to be incompetent to testify but the Swans do not make any similar contention with respect to B.A.'s statements.

declarations. It clearly considered her incompetent only as to the former." *Swan*, 6 F.3d at 1382; *see also State v. Swan*, 114 Wn.2d at 651 ("During the competency hearing, . . . R.T. could not respond appropriately to questions in a court room setting"). Moreover, the trial court in the Swans' case specifically noted that R.T.'s incompetency to testify would be weighed in its determination of the reliability of R.T.'s statements. That the trial court ultimately concluded that R.T.'s statements were reliable despite her incompetency to testify does not undercut the admissibility of her statements.

The Swans' allegation that R.T.'s later, incorrect statements to a police detective were evidence of a lack of corroboration and, therefore, demonstrate that R.T.'s earlier disclosures were unreliable, *see* Petition, Question III and pp. 40-44, is incompatible with their argument that consistency or cross-corroboration is not a legitimate factor to consider in determining the reliability of a hearsay statement. Moreover, this Court held in *Wright* that evidence tending to corroborate the truth of a hearsay statement is irrelevant to the Confrontation Clause analysis for reliability. *Wright*, 497 U.S. at 822. If corroboration sheds no light on the reliability of a hearsay statement, then a later, arguably noncorroborative statement is also irrelevant to determining the reliability of the earlier statement.

The Swans argue that the reporters of B.A. and R.T.'s hearsay statements (Lisa Conradi and Cindy Bratvold) were "predisposed" to find sexual abuse and that the girls' statements were unreliable as a result. Petition, Question V. However, their allegation of "predisposition" is purely speculative, is unsupported by any findings, and is more properly a matter for the jury to weigh in determining the witnesses' credibility and whether they actually heard the girls' statements. The Swans were free to argue and did argue to the jury that witnesses Conradi and Bratvold were predisposed to finding sexual abuse. There is similarly no evidence to support the Swans' broad allegation that B.A. and R.T. were "tainted" for purposes of their later interviews due to the conduct of their earlier interviews. Petition, Question VI.

The facts of the Swans' case have been thoroughly and exhaustively reviewed by eighteen judges, all of whom have concluded that B.A. and R.T.'s out-of-court statements were reliable under the Confrontation Clause. The Ninth Circuit's affirmance of the district court constituted no departure from *Idaho v. Wright*, and there is no conflict among the circuits on this issue. This case does not present any ground for acceptance of review under Supreme Court Rule 10.1. Therefore, the Swans' petition should be denied.

### B. The Confrontation Clause Analysis Urged By the Swans and *Amicus* Would Require the Creation and Retroactive Application of a New Rule, in Violation of *Teague v. Lane*.

In their remaining argument in this Court, the Swans and *amicus* argue that the Confrontation Clause requires that: (1) a criminal defendant cannot be convicted on the basis of hearsay alone;[7] (2) arguably noncorroborative evidence should be factored into the reliability analysis; (3) the trial court must, as a threshold matter, assess the credibility of the witness reporting the hearsay statements. *See* Petition, Question VI; Brief of Amicus, Questions 1, 3, 4 (p. 9).[8] However, each of those arguments would require that this Court create a new constitutional rule of criminal procedure on federal habeas corpus review, a step this Court has clearly emphasized is inappropriate to take. *Teague v. Lane*, 489 U.S. 288 (1989). Whatever may be the merits of their policy arguments, this case is not the case for deciding such arguments.

The Swans and *amicus* argue that the Confrontation Clause requires that a criminal defendant cannot be convicted on

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[7]The Ninth Circuit specifically declined to reach the merits of this contention because it was raised for the first time on appeal, not in their habeas petition, and because it was raised by *amicus* only and was not adopted by the Swans. *Swan*, 6 F.3d at 1383. For that additional reason this Court should deny certiorari.

[8]This Court has not yet ruled on the Motion for Leave to File *Amicus Curiae* Brief. Respondents are addressing the arguments of *amicus* in this Brief in Opposition only in the event this Court grants *amicus'* motion.

the basis of hearsay evidence alone. They argue that hearsay alone should be considered inadequate as a matter of law to sustain a conviction because otherwise "there necessarily remains the reasonable doubt that the declarant misspoke, misstated, misremembered, or misperceived." Brief of *Amicus* at 35. Neither the Swans nor *amicus*, however, can point to any decision by this Court at the time their convictions became final that would require a state court to set aside a conviction based solely upon hearsay.[9] Indeed, *amicus* acknowledges this by describing this issue as an "*unresolved* and fundamentally important question." *Id.* at 34 (emphasis added). Thus, the argument specifically requests that the Court create a new constitutional rule of criminal procedure.

*Amicus* would also require that the trial court consider arguably noncorroborative evidence (*i.e.*, the lack of medical evidence of sexual abuse) in deciding whether a child's hearsay statement is reliable. However, that is a requirement that would necessitate a retraction of *Wright*'s consistent teaching that corroboration of a hearsay statement is constitutionally

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[9]As the Ninth Circuit observed, it is not altogether clear that the Swans convictions rest solely on the hearsay evidence. *Swan*, 6 F.3d at 1383 n. 11. The Washington Supreme Court found that R.T.'s behavior with an anatomically correct doll, B.A.'s masturbatory conduct and the slight physical and emotional evidence of her abuse, and the two girls' unusual "greetings" of each other (consisting of the girls running up to each other, grabbing their crotches, and giggling) provided some corroboration to their statements. *State v. Swan*, 114 Wn.2d at 641.

irrelevant. *Wright*, 497 U.S. at 822. The exclusive focus under *Wright* is that the hearsay statement possess the requisite indicia of reliability "by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Id.* Requiring trial courts to weight arguably noncorroborative evidence would shift the trial court's focus away from the "*inherent* trustworthiness" of the statement and would constitute a sharp break from *Wright*.

Finally, requiring trial courts to assess the credibility of the reporting witness of the hearsay statement as part of the reliability inquiry is also a drastic departure from *Wright*. *Wright* limits the reliability inquiry to whether the circumstances "that surround the making of the statement and that make the *declarant* particularly worthy of belief." 497 U.S. at 820 (emphasis added). No court has held that the credibility of the reporting witness -- a question reserved for the jury -- must be weighed by the trial court as a threshold factor bearing on the reliability of a hearsay statement. To impose such a requirement now would introduce a new species of analysis into the Confrontation Clause test for reliability.

In short, none of the Swans and *amicus'* policy contentions regarding how a trial court "should" conduct its reliability inquiry or the legal sufficiency of a conviction is required by *Wright* or by any other decisions in existence at the time their convictions became final. The Swans' case, a case

arising in the context of federal habeas corpus review, is not a proper occasion for this Court to depart from precedent and create new constitutional rules of criminal procedure. Therefore, for this additional reason the Swans' petition should be denied.

## III. CONCLUSION

Respondents respectfully request that this Court deny the Swans' Petition for a writ of certiorari.

RESPECTFULLY SUBMITTED,

CHRISTINE O. GREGOIRE
Attorney General

PAUL D. WEISSER
Assistant Attorney General
Counsel of Record

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Petitioners,

v.

KURT S. PETERSON, WARDEN OF WASHINGTON
CORRECTION CENTER, ET AL.,

Respondent.

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On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

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# REPLY BRIEF FOR THE PETITIONERS

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NO. 93-1633

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

October Term, 1993

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WILLIAM O. SWAN AND
KATHLEEN R. SWAN,

Petitioners,

v.

KURT S. PETERSON, WARDEN OF WASHINGTON
CORRECTION CENTER, ET AL.,

Respondent.

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On Petition for Writ of Certiorari
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# REPLY BRIEF FOR THE PETITIONERS

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## I. ADOPTING THE SWANS' CONFRONTATION CLAUSE ARGUMENTS BASED ON IDAHO v. WRIGHT WOULD NOT REQUIRE THE ESTABLISHMENT OF A NEW RULE IN VIOLATION OF TEAGUE v. LANE.

Respondents allege that in judging the reliability of the hearsay statements under Wright's "totality of the

circumstances" test, Idaho v. Wright, 497 U.S. 805, 820 (1990), the Ninth Circuit properly ignored the fact that Rachel "did not understand the obligation to tell the truth" and "did not have sufficient memory to speak truly about past events"; the fact that Conradi and Bratvold were predisposed to find abuse and had no training in neutral questioning; and the fact that other evidence contradicted the allegations of abuse. Respondents seek to evade review by further alleging that the consideration of any of this evidence would constitute a "new rule" under this Court's decision in Teague v. Lane, 489 U.S. 288 (1989).

Under Teague, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government," or "[t]o put it differently, a case announces a new rule if the result was not dictated by

precedent existing at the time the defendant's conviction became final." Id. at 301. In their petition, the Swans do not ask this Court to break new ground or impose any new obligations on either the States or the Federal Government. Rather, the Swans merely request a faithful application of Wright's "underlying principle." Wright v. West, 112 S. Ct. 2482, 2497 (1992) (O'Connor, J., concurring).

Under Idaho v. Wright, hearsay admitted pursuant to a non-traditional hearsay exception must possess particularized guarantees of trustworthiness "drawn from the totality of the circumstances that surround the making of the statement **and** that render the declarant particularly worthy of belief." 497 U.S. at 820 (emphasis added). This does not mean that a judge should only look to evidence tending to

indicate trustworthiness and should ignore evidence indicating untrustworthiness. Wright's true focus is on reliability. It mandates a weighing of factors supporting trustworthiness against those indicating untrustworthiness.

In this case, the circumstances that surround the making of the children's statements necessarily include who was doing the questioning, the questioner's potential for bias, and how the questioning was conducted. The circumstances that render the children particularly **unworthy** of belief include the existence of evidence which tends to show that their statements were false and Rachel's inability to distinguish fact from fiction. The Ninth Circuit erred when it refused to consider these factors which show that the children's hearsay statements were **unreliable**. Indeed, the rule applied by the Ninth Circuit would

logically allow the admission of a blind man's hearsay statement describing what he saw as told to and reported by a deaf man, where such statements were made spontaneously and without motive to fabricate, the blind man was not prone to lying and the allegations were consistent over time. As Abraham Lincoln said, "nothing should be implied as law which leads to unjust or absurd consequences." Louise Bachelder, Abraham Lincoln: Wisdom and Wit 25 (1965).

That the Swan's request for a faithful application of Wright implicates no "new rule" is further demonstrated by the opinion in Wright itself. As the New Jersey Supreme Court explained:

> The United States Supreme Court in Idaho v. Wright noted with approval the conclusion of the Idaho Supreme Court that the failure to video tape interviews with alleged child victims, the use of blatantly leading questions, and the presence of an interviewer with a

> preconceived idea of what the child should be disclosing, in addition to children's susceptibility to suggestive questioning, all indicate the potential for the elicitation of unreliable information.

State v. Michaels, 642 A.2d 1372, 1378 (N.J. 1994) (internal citations omitted). Thus, in Wright, this Court recognized the Constitutional importance of examining evidence indicating the **untrustworthiness** of hearsay statements offered into evidence pursuant to non-traditional exceptions.

Indeed, the Ninth Circuit's decision can only be viewed as an aberration in light of the decisions of other courts correctly applying Wright. In United States v. Accetturo, 966 F.2d 631 (11th Cir. 1992), the Eleventh Circuit, after discussing the factors supporting the reliability of a hearsay statement, continued: "There was also some contrary evidence; there were some indications that

[the] statement was not trustworthy." Id. at 636. After examining that evidence, the court "carefully weighed" it against the evidence suggesting trustworthiness to reach a final conclusion about admissibility. Id.

The strongest evidence that the Ninth Circuit deviated from Wright comes from the Ninth Circuit itself. Just last month, a Ninth Circuit panel granted a writ of habeas corpus to vindicate a Confrontation Clause violation far less egregious than the one that occurred in this case. The panel noted:

> Wright forbids recourse to other evidence to corroborate the trustworthiness of the hearsay offered; **Wright does not forbid recourse to other evidence that confirms the presumptive unreliability of the hearsay.**

Webb v. Lewis, 1994 WL 455607 at *6 (9th Cir. August 24, 1994).

One of the underlying principles behind Teague was to prevent the "harm

caused by the failure to treat similarly situated defendants alike[:] such inequitable treatment hardly comports with the ideal of administration of justice with an even hand." 489 U.S. at 315 (citations omitted). This principle militates in favor of granting certiorari in this case for, given the Ninth Circuit's recent opinion in Webb, the Swans have clearly received inequitable treatment.

Accordingly, this Court's review of the Ninth Circuit's application of Wright is not barred by Teague.

**II. TEAGUE v. LANE DOES NOT PRECLUDE THIS COURT FROM DECIDING WHETHER THE CONFRONTATION CLAUSE PROHIBITS A STATE FROM CONVICTING A CRIMINAL DEFENDANT SOLELY ON THE BASIS OF HEARSAY.**

*Amicus'* argument that a criminal defendant cannot be convicted solely on the basis of hearsay is also properly before this Court. First, contrary to the

Respondent's allegations, the State's only evidence of the Swan's guilt was presented in the form of hearsay. The Ninth Circuit left this question unresolved but noted that "the medical evidence regarding [Beth Anne] and also, to a lesser extent, [Rachel's] play with an anatomically correct doll" was non-hearsay evidence potentially supporting the Swan's conviction. Swan v. Peterson, 6 F.3d 1373, 1383 (9th Cir. 1993). However, the Ninth Circuit's opinion describes the medical evidence as "merely equivocal." Id. at 1385. Furthermore, the evidence of Rachel's out of court play with a doll was offered to show that the Swans committed the alleged acts; thus, it was also hearsay. See, e.g., State v. Townsend, 635 So.2d 949, 959 (Fla. 1994); Hutchcraft v. Roberts, 809 F. Supp. 846, 851 (D. Kan. 1992).

Second, this Court would not be violating Teague by concluding that a criminal defendant cannot be convicted solely on the basis of hearsay. While this Court has never explicitly adopted this rule, it is dictated by Warzower v. United States, 312 U.S. 342 (1941) and Opper v. United States, 348 U.S. 84 (1954). The rule is simply a variation of the principle that certain forms of evidence, while admissible, are not sufficient to provide the sole basis for a conviction beyond a reasonable doubt. In Warzower, this Court explained that a confession must be corroborated as to "each element of the corpus delicti." 312 U.S. at 346. Similarly, in Opper, the Court stated that:

> Admissions, retold at a trial, are much like hearsay, that is, statements not made at the pending trial. They had neither the compulsion of the oath nor the test of cross-examination.

348 U.S. at 90. Because of the inherent unreliability of admissions -- just like the presumptive unreliability of non-traditional hearsay -- the Court held that "the Government must introduce substantial independent evidence which would tend to establish the trustworthiness of the statement." Id. at 93.

Moreover, under Teague, "[i]f a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies," no new rule is implicated. Wright v. West, 112 S. Ct. 2482, 2497 (1992) (O'Connor, J., concurring). The only distinction between this case and Warzower and Opper is that hearsay, instead of other presumptively unreliable forms of evidence like a confession or an admission, constituted the prosecution's sole case against the Swans. The

underlying constitutional principle is the same: some evidence, while admissible, is insufficiently reliable by itself to sustain a conviction.

Even if the rule that a criminal defendant cannot be convicted solely on the basis of hearsay would be "new," this Court may still grant certiorari because such a rule would fall within Teague's second exception for "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." Saffle v. Parks, 494 U.S. 484, 495 (1990) (internal quotation marks omitted). This Court in In re Winship, 397 U.S. 358, 364 (1970), held that the Constitution requires proof beyond a reasonable doubt to convict a criminal defendant. This decision was "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than

to let a guilty man go free." Id. at 371 (Harlan, J., concurring).

The same Constitutional values underlie the principle that a criminal defendant cannot be convicted solely on the basis of hearsay. This rule would be "central to an accurate determination of innocence or guilt. . ." Teague, 489 U.S. at 313. Indeed, it would go to the very heart of that determination.

The fundamental nature of such a rule is generally recognized by prosecutors. For example, one Assistant United States Attorney, when asked by a Seventh Circuit judge if hearsay alone would be sufficient to convict a criminal defendant, responded:

> If I were a prosecutor, I wouldn't give it to the grand jury. If I was a grand juror, I wouldn't indict it. If I were a district court judge, I'd grant the Rule 29 motion [for judgment of acquittal]. If I were a juror, I would vote to acquit, and if I was a member of this

> court, I'd vote to reverse for sufficiency.

United States v. Martinez De Ortiz, 907 F.2d 629, 638 (7th Cir. 1990) (en banc) (Cudahy, Circuit Judge, concurring).

In sum, Teague does not bar this Court from considering whether a criminal defendant can be convicted solely on the basis of hearsay.

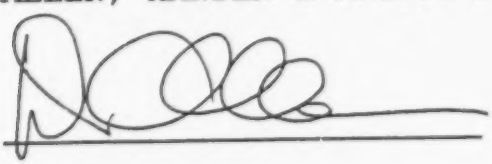
## CONCLUSION

The petition for a writ of certiorari should be granted.

DATED this 21st day of September, 1994.

Respectfully Submitted,

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